

1989

## Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration

Richard W. Hulbert

---

### Recommended Citation

Richard W. Hulbert, *Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration*, 7 INT'L TAX & BUS. LAW. 155 (1989).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol7/iss2/1>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration

Richard W. Hulbert

I. The Setting of the Problem .....	159
II. The Perceived Adequacy of the Arbitral Process as a Key Element of the Decision to Require Arbitration .....	161
III. <i>McDonald</i> and <i>Byrd</i> : The Uncertain Effect of an Arbitral Award .....	165
A. <i>McDonald</i> and <i>Byrd</i> .....	166
B. The Clash of Rationales .....	171
C. The Departure from Common Law Doctrine Reflected in <i>McDonald</i> .....	173
IV. The Procedural Characteristics and Legal Regime Of International Commercial Arbitration .....	179
A. Procedural Aspects .....	180
B. The Legal Implications of the New York Convention on the Effect of International Awards .....	187
V. Defining the Guiding Principles .....	190
A. The "Full and Fair Opportunity" Approach .....	193
B. The Contractual Model .....	198
Conclusion .....	200

# Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration

Richard W. Hulbert†

It is no longer news that Supreme Court decisions in the past five years have greatly expanded the enforceable scope of agreements to arbitrate disputes, in what may fairly be described as a second major sea-change in the evolution of U.S. law on the subject.<sup>1</sup> In scarcely more than sixty years the jurisprudence has moved from a persistent refusal to enforce agreements to arbitrate<sup>2</sup> to the enforcement of arbitration as a suitable process for the resolution of complex disputes invoking the application of legislation expressive of fundamental social policy.<sup>3</sup> These substantive pronouncements have been reinforced by contemporaneous court decisions emphasizing that arbitration clauses are to be broadly construed, that any doubt whether a particular dispute is embraced within an agreement to arbitrate is to be resolved in favor of arbitration, and that arbitration is to be required even if the consequence is

---

† Partner, Cleary, Gottlieb, Steen & Hamilton; Adjunct Professor 1988, Boalt Hall School of Law, University of California, Berkeley; L.L.B. Harvard Law School, 1955; A.B. Harvard College, 1951. The author has participated as an arbitrator or counsel in a number of international arbitrations in the United States and abroad.

1. The first important change was the enactment of legislation overturning judicial refusal to enforce agreements to arbitrate, first by New York in 1920, Laws 1920, ch. 275, now with many subsequent amendments, N.Y. Civ. Prac. L. & R., art. 75 (McKinney 1972), followed in 1925 by enactment of the Federal Arbitration Act, Act of Feb. 12, 1925, ch. 213, § 1, 9 U.S.C. §§ 1-14 (1982), which was closely modelled on the New York statute. See S. REP. No. 536, accompanying S. 1005, 68th Cong., 1st Sess. 3 (1924). Under these statutes, agreements to arbitrate were made "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." N.Y. Laws 1920, ch. 275, § 2; 9 U.S.C. § 2 (1982).

2. See, e.g., *Tobey v. County of Bristol*, 23 Fed. Cas. 1313 (Cir. Ct. Mass. 1845) (Story, J.); *Sanford v. Commercial Travelers' Mutual Accident Assn.*, 147 N.Y. 326, 41 N.E. 694 (1895). An extensive discussion of the doctrine and its asserted justifications appears in Judge Frank's opinion in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-85 (2d Cir. 1942). See also *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum, Co., Ltd.*, 222 Fed. 1006 (S.D.N.Y. 1915), in which Judge Hough strongly criticized the current doctrine, which permitted an American to "make a solemn contract [for arbitration] in England and repudiate it at will in America with the approbation of the courts of his own country," but held that he was bound to follow it. *Id.* at 1007.

3. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (ordering arbitration of an antitrust counterclaim under an international contract); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (ordering arbitration of domestic claims under the Securities Exchange Act of 1934 [hereinafter Exchange Act] and the Racketeer Influenced and Corrupt Organizations Act [hereinafter RICO]).

piecemeal litigation and resulting inefficiency.<sup>4</sup> These decisions have been based upon the perceived mandate of the Federal Arbitration Act,<sup>5</sup> which has been proclaimed to constitute substantive federal law, overriding, in interstate and foreign commerce, inconsistent state law.<sup>6</sup> Although these developments

---

4. In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), the Court stated that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," which requires that "we rigorously enforce agreements to arbitrate," and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985), it was stated that courts must not "allow the fortuitous impact of the [Federal Arbitration] Act on efficient dispute resolution to overshadow the underlying [congressional] motivation." See *supra* note 1.

The Court's recent decision in *Volt Information Services, Inc. v. Bd. of Trustees of The Leland Stanford Junior Univ.*, 109 S.Ct. 1248 (1989), seems, however, to be inconsistent with this trend. There, the Court construed a choice of law clause in a form construction contract, which provided that the contract was to be governed by the law of the place where the project was located, to refer not merely to the substantive law of California but also to California procedural law relating to arbitration. The contract was, thus, held to permit a deferral of arbitration pending judicial resolution of related disputes between the University and two other parties not subject to an agreement to arbitrate, although it was conceded that were the Federal Arbitration Act applicable a deferral of the arbitration would not be proper. In dissent, Justice Brennan challenged this construction of the contract and pointed out that, if other states were similarly to read such choice of law clauses as excluding the application of federal law, "the result would be to render the Federal Arbitration Act a virtual nullity as to presently existing contracts." *Id.* at 1262.

5. Federal Arbitration Act, Act of Feb. 12, 1925, ch. 213, § 1, 9 U.S.C. §§ 1-14 (1982).

6. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984), holding that the California Franchise Investment Act, which reserved disputes between franchisers and franchisees for judicial resolution, must give way in state court litigation to the command of the federal statute. This holding was reaffirmed in *Perry v. Thomas*, 482 U.S. 483 (1987) (state legislation exempting wage claims from arbitration is preempted by the Federal Arbitration Act, which requires enforcement of agreements to arbitrate all claims affecting interstate commerce).

The principle enunciated in *Southland* is a far cry from the contemporary view taken of the New York and federal legislation, which was that this legislation concerned only the matter of the remedy and was thus purely procedural. See *Cohen & Drayton, The New Federal Arbitration Act*, 12 VA. L. REV. 265, 275-78, 279 (1926). The purely procedural character of the proposed federal legislation was emphasized by its proponents in the congressional committee hearing, where it was urged that the proposed statute was

no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws . . . . [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.

*Joint Hearings on S. 1005 and H.R. 646 Before the Joint Comm. of the Subcomms. on the Judiciary*, 64th Cong., 38 (1924) (brief submitted by J. H. Cohen, principal draftsman of the bill). It was on that basis that the constitutionality of the statutes was sustained, in opinions by three of the most eminent American judges of this century. *Berkowitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 130 N.E. 298 (1921) (Cardozo, J.) (sustaining the New York statute against state constitutional challenge); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924) (Brandeis, J.) (sustaining the constitutionality of the application of the New York statute to a maritime claim in the state court arising under the savings clause); *Marine Transit Corp. v. Dreyfuss*, 284 U.S. 263 (1932) (Hughes, C.J.) (sustaining the constitutionality of the Federal Arbitration Act). On similar reasoning the New York statute was held inapplicable in a diversity case in the federal court commenced prior to the enactment of the Federal Arbitration Act. *Lappe v. Wilcox*, 14 F.2d 861 (N.D.N.Y. 1926).

The intervention of the *Erie* doctrine led to a total reversal of the earlier view. The decision in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), that arbitration *vel non* was outcome-

have had their critics,<sup>7</sup> the result of these decisions is that essentially all of the statutory claims likely to arise in commercial disputes, in addition to the staple contractual claims, are now arbitrable.<sup>8</sup>

These striking results could only be viewed as quixotic, unless there were confidence that the arbitral process is adequate for the enlarged tasks now confided to it and unless the consequences of arbitration will stand, at least presumptively, as the essential equivalent of the judicial judgment that would have been reached had arbitration not been enforced. Yet, in this same recent period the Supreme Court, in one case, denied all effect to an arbitral award as against a subsequent jury verdict,<sup>9</sup> and in another, indicated that the preclusive effect, if any, to be given to an arbitral award must be addressed by the district courts on a case-by-case basis.<sup>10</sup> Even more disquieting is the rationale offered by a unanimous Court in one of these decisions, *McDonald v. City of West Branch*,<sup>11</sup> for denying *res judicata* effect to an arbitral award — a rationale consisting of a series of observations about the characteristics of arbitral procedure that are applicable, for the most part, to any arbitration.<sup>12</sup>

---

determinative for *Erie* purposes, threatened to eliminate the applicability of the Federal Arbitration Act in many diversity cases. The first suggestion that the Act should be construed to have established federal substantive law binding on the states followed shortly thereafter in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909, cert. dismissed, 364 U.S. 801 (1960). See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985).

In holding the Act to have created a body of federal substantive law, the Court in *Southland* preserved the Act for application in federal courts, and in that sense promoted the congressional intention. However, the Court's reasoning was foreign to that which underlay enactment of the Act and has consequences upon state claims in state courts for which no contemporary intention can be established, as the dissenting opinion of Justice O'Connor in *Southland* persuasively demonstrates. 465 U.S. at 864-71.

7. The *Mitsubishi* decision, in particular, has been subjected to criticism. See, e.g., Carbonneau, *Mitsubishi: The Folly of Quixotic Internationalism*, 2 ARB. INT'L 116 (1986); Lipner, *International Antitrust Law: To Arbitrate or Not to Arbitrate*, 19 GEO. WASH. J. INT'L L. & ECON. 395 (1985); Smit, *Mitsubishi: It is Not What it Seems to Be*, 4 J. INT'L ARB. 7 (1987). Professor Carbonneau, in a recent article addressed to a European audience, has expanded his criticism of this series of Supreme Court decisions, emphasizing the failure of the Court to take account of the important distinctions between international and domestic arbitration. Carbonneau, *L'Arbitrage en Droit Américain*, REVUE DE L'ARBITRAGE (1988) 3, 43-50. See also *infra* note 43.

8. Although *Mitsubishi* left formally undisturbed in a domestic context the doctrine that antitrust claims are not arbitrable, see *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), the extension of the *Mitsubishi* rationale to domestic RICO claims in *McMahon* has led commentators to question its continuing vitality. See, e.g., McGrath, *Son of Mitsubishi — Arbitration of Domestic Antitrust Disputes*, 12 BROOKLYN J. INT'L L. 693 (1986). At least two District Court decisions have pronounced it dead. *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F. Supp. 972, 978-80 (S.D.N.Y. 1987); *Genna v. Lady Foot Int'l Inc.*, No. 85-4372, slip op. at 222 (E.D. Pa. Jan. 24, 1986).

9. *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984).

10. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

11. 466 U.S. 284 (1984).

12. See *infra* notes 74-80 and accompanying text.

This disparagement of the arbitral process, in the context of the *res judicata* or collateral estoppel effect to be given to arbitral awards, is inconsistent with the rationale offered to justify the recent expansion of the scope of arbitrability and is at odds with a century and a half of settled case law. If the criticisms are understood to be directed at international commercial arbitration, they are largely misconceived. If applied to undercut international awards, they would threaten the integrity of U.S. treaty obligations. It is the thesis of this article that the procedures and reasoned awards typical of international commercial arbitration support the application of preclusion doctrine to international commercial arbitration to the same extent as to domestic judicial decisions.

## I.

### THE SETTING OF THE PROBLEM

"International commercial arbitration," as used here, refers to the decision by arbitration, whether "administered" or "ad hoc,"<sup>13</sup> of disputes arising under contracts implicating the interests of more than one country.<sup>14</sup> The parties are almost always of different nationalities, the commercial dealings between them almost invariably involve two or more countries,<sup>15</sup> and the arbitrators are themselves usually of diverse nationalities.<sup>16</sup> The situs of the arbitration frequently has nothing to do with the place of contracting or performance, but is often selected primarily for its convenience to the parties or precisely because it is "neutral" in respect to the parties. The choice of situs is limited only by a concern that, in order to ensure wide enforceability of the award, the arbitration take place on the territory of a signatory to the 1958

---

13. By "administered" arbitration is meant arbitration conducted under the auspices of a sponsoring body, such as the Court of Arbitration of the International Chamber of Commerce [hereinafter ICC], the American Arbitration Association [hereinafter AAA], or the London Court of International Arbitration [hereinafter LCIA]. Each of these bodies has published rules for the conduct of arbitration, offers its services as an appointing authority, and provides advice to parties contemplating arbitration or engaged in it. See Gaudet, *The International Chamber of Commerce Court of Arbitration*, 4 INT'L TAX & BUS. LAW. 213 (1986); Hoellering, *Is a New Practice Emerging from the Experience of the American Arbitration Association?*, 4 INT'L TAX & BUS. LAW. 230, 233-35 (1986).

"Ad hoc" arbitration, by contrast, is arbitration conducted entirely under contractual provisions adopted by the parties without recourse to institutional support.

14. Article 1492 of the French New Code of Civil Procedure (Decree No. 81-500, May 12, 1981) defines "international arbitration" with classic civil law sweep: "Arbitration is international when it involves the interests of international trade." Translated in J-L DELVOLVÉ, *ARBITRATION IN FRANCE: THE FRENCH LAW OF NATIONAL AND INTERNATIONAL ARBITRATION* 83 (1982).

15. The 285 requests for arbitration received by the ICC in 1987 involved parties from seventy-seven different countries. *Cours d'Arbitrage de la Chambre de Commerce Internationale — Chroniques des Sentences Arbitrales*, 115 JOURNAL DU DROIT INTERNATIONAL — CLUNET 1196, 1197 (Derains and Alvarez, eds. 1988) [hereinafter CLUNET].

16. For example, in 1987 the Court of Arbitration of the ICC nominated or approved arbitrators of forty-four different nationalities. *Id.*

Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").<sup>17</sup>

The choice of arbitration as the process for the resolution of a dispute necessarily reflects, above all, an explicit rejection by the contracting parties of recourse to national courts. The parties to an international contract may harbor suspicions about the impartiality of the courts of the other party's country; they may thus prefer arbitration, not to avoid the application of law, but in order to avoid a perceived risk of its uneven application.

Illustrative of a very common pattern is an arbitration which in an initial phase came before the District Court for the Southern District of New York.<sup>18</sup> At issue was a dispute between the Korean general contractor of a hospital project in Saudi Arabia and the U.S. subcontractor engaged to provide technical and design services. The subcontract was signed in New York, but much of the work was performed in England, and additional on-site services were provided in Saudi Arabia. It contained no express choice of governing law, perhaps because the parties did not wish to subject their relationship to Saudi law but could agree on no other. The contract provided that disputes should be resolved by arbitration in Paris under the rules of the Court of Arbitration of the International Chamber of Commerce (ICC). Paris was presumably chosen because it was perceived as a neutral forum, conveniently accessible to the parties, and because France is a signatory to the New York Convention.<sup>19</sup> Before the dispute was settled, an arbitral panel had been established. The parties nominated an American lawyer in Paris and a French lawyer who was also an engineer, and the ICC appointed as chairman an English barrister with a long experience in construction contract arbitration.

The question posed in this paper, to take the foregoing case as illustrative, is whether the effect that a U.S. court should give to the arbitral award that would have resulted in that case, had it not been settled, should be different from the effect that would be given to a judgment of a U.S. federal or state court, had the dispute been resolved there by formal adjudication.

---

17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention]. Article I, paragraph 3 of the New York Convention authorizes a signatory to declare "that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." A number of countries, including the United States, have adhered to the Convention with such a declaration. See the annotated list of signatories following 9 U.S.C. § 201 (1982).

18. *Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Construction Co., Ltd.*, 598 F. Supp. 754 (S.D.N.Y. 1984).

19. France adhered to the New York Convention, effective September 24, 1959. Decree of September 1, 1959, No. 59-1039, J.O. 8276 (September 6, 1959).

## II.

### THE PERCEIVED ADEQUACY OF THE ARBITRAL PROCESS AS A KEY ELEMENT OF THE DECISION TO REQUIRE ARBITRATION

The Supreme Court decisions in the last thirty years concerning the enforcement of agreements to arbitrate have closely tied the result reached to an evaluation of the adequacy of the arbitral process — a logic that is unassailable. Thus, in *Wilko v. Swan*,<sup>20</sup> the Court refused to enforce arbitration of a claim under Section 12(2) of the Securities Act of 1933 (“Securities Act”) largely on the ground that, although the special substantive and burden of proof provisions of the Securities Act would apply in arbitration,<sup>21</sup> “their effectiveness in application is lessened in arbitration as compared to judicial proceedings.”<sup>22</sup> Arbitrators “without judicial instruction on the law” — and who might, indeed, not be lawyers — would have to determine the purpose and knowledge of the alleged violator. Furthermore, arbitrators’ awards “may be made without explanation of their reasons and without a complete record of their proceedings.”<sup>23</sup> Thus, the arbitrators’ concepts of the statutory requirements of burden of proof, reasonable care, or material fact “cannot be examined.”<sup>24</sup> The Court also noted that the judicial power to vacate an award was limited: “the interpretations of the law by the arbitrators in contrast to manifest disregard . . . are not subject to judicial review.”<sup>25</sup> The Court concluded that “[t]he protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness.”<sup>26</sup>

Twenty years later in *Scherk v. Alberto-Culver Co.*,<sup>27</sup> the Court enforced an agreement to arbitrate in Zurich a claim under the Securities Exchange Act of 1934 (“Exchange Act”) that arose out of the purchase of assets and trademarks of foreign companies doing business in Europe. The international

---

20. *Wilko v. Swan*, 346 U.S. 427 (1953).

21. The respondent accepted that the arbitration clause did not relieve it from either the liability or the burden of proof imposed by the Securities Act. *Id.* at 433.

22. *Id.* at 435.

23. *Id.* at 436.

24. *Id.*

25. *Id.* This passage is the origin of the doctrine of “manifest disregard” of the law, as a ground beyond those specified in 9 U.S.C. § 10 (1982), on which an award may be vacated, that subsequently so plagued the lower courts. *See, e.g.*, *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (2d Cir. 1961); *I/S Stavborg v. Nat’l Metal Converters, Inc.*, 500 F.2d 424, 430-31 (2d Cir. 1974).

26. 346 U.S. at 437. Justice Jackson concurred, adding that in his view the parties were free to agree to arbitration of an existing dispute. *Id.* at 438. Justice Frankfurter, with whom Justice Minton joined, dissented on the ground that there had been no adequate showing that the arbitral system would not afford the plaintiff the rights to which he was entitled, and that the advantages of arbitration should not be denied in the absence of such a showing. *Id.* at 439-40. Then, in a well-known passage, he asserted that “[a]rbitrators may not disregard the law” and that some “appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.” *Id.* at 440.

27. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

character of the transaction was held to justify a departure from *Wilko*.<sup>28</sup> Justice Reed's cautions in *Wilko* about the procedural deficiencies of arbitration provided the principal basis for Justice Douglas' dissent in *Scherk*.<sup>29</sup> Justice Douglas characterized as "ominous" the "international aura" given to the case by the majority and presaged judicially enforced evasion of American substantive law.<sup>30</sup> The dissent contended that the procedural shortcomings of arbitration were no less serious than they had been viewed in *Wilko*.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>31</sup>, clearly the centerpiece of the recent revolutionary expansion of arbitration, the contrasting views of the majority and the dissenters as to the efficacy of arbitral procedure were critical to their respective conclusions concerning the appropriateness of enforcing arbitration of an antitrust counterclaim under an international contract.<sup>32</sup> The central question before the Court was whether an exception was to be made in the international context to the doctrine that antitrust claims were inappropriate for arbitration.<sup>33</sup> The majority opinion in *Mitsubishi* reviewed, and rejected in turn, each of the grounds for the doctrine, including the characterization of antitrust claims as too complex to be entrusted to arbitration. The Court of Appeals in *Mitsubishi*<sup>34</sup> had stated that antitrust claims, requiring sophisticated legal and economic analysis, were "ill-adapted to the strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity."<sup>35</sup> The Supreme Court questioned the cogency of this argument, given that lower courts had found it appropriate to enforce agreements to submit existing (as distinct from future) antitrust claims to arbitration.<sup>36</sup> The Court noted that "adaptability and access to expertise are hallmarks of arbitration,"<sup>37</sup> and that arbitration rules "typically

---

28. *Id.* at 515. Such a contract, in the view of the majority, "involve[d] considerations and policies significantly different from those found controlling in *Wilko*." *Id.* Arbitration was seen as providing needed certainty in a situation, as to choice of law and forum for resolution of disputes, otherwise almost necessarily uncertain. The arbitration clause, in this context, was viewed as "in effect, a specialized kind of forum-selection clause." *Id.* at 519. The validity of such clauses, in the international context, had been recently sustained by the Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), a case that concerned an international towing contract providing for jurisdiction of suits in the English courts.

29. *Scherk*, 417 U.S. at 521. He was joined by Justices Brennan, White, and Marshall.

30. *Id.* at 533.

31. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

32. *Id.* at 632-34, 647-50. Justice Blackmun wrote for the Court. Justice Stevens filed a dissenting opinion in which Justice Brennan joined, and in which Justice Marshall joined except as to Part II of the dissent (concerning the question of whether the arbitration clause covered the antitrust issue).

33. The leading case holding that antitrust claims are inappropriate for arbitration is *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

34. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 723 F.2d 155 (1st Cir. 1983).

35. *Id.* at 162.

36. *Mitsubishi*, 473 U.S. at 633. *See, e.g.*, *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1973).

37. *Mitsubishi*, 473 U.S. at 633.

provide for the participation of experts either employed by the parties or appointed by the tribunal."<sup>38</sup> The Court was unwilling to "indulge the presumption" that the parties and the Japan Commercial Arbitration Association, the institution named in the arbitration clause, would be unable or unwilling to retain "competent, conscientious, and impartial arbitrators."<sup>39</sup>

In contrast, the dissent insisted that the "rudimentary procedures" in arbitration and the frequently inadequate record often mean that the arbitrator's decision is "virtually unreviewable."<sup>40</sup> The dissent noted that the procedures of the Japan Commercial Arbitration Association did not provide any right to evidentiary discovery or a written decision, required that all proceedings be closed to the public, and did not provide for testimony under oath, and noted also that the arbitration would be conducted under a legal regime that gave the Japanese arbitrators no power of compulsory process to secure the attendance of witnesses or the production of documents.<sup>41</sup>

In *Shearson/American Express, Inc. v. McMahon*,<sup>42</sup> the Court further extended the reach of enforceable arbitration, this time to claims in a purely domestic context under the Racketeer Influenced and Corrupt Organizations Act (RICO) and under Section 10(b) of the Exchange Act. The RICO claim was disposed of on the basis of *Mitsubishi*. The Court found much of the *Mitsubishi* reasoning to be equally applicable to a domestic claim.<sup>43</sup> RICO

---

38. *Id.*

39. *Id.* at 634.

40. *Id.* at 656-57.

41. *Id.* at 657, n. 31. The dissent particularly relied on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitration pursuant to a collective bargaining agreement of a claim of employment discrimination does not bar a statutory right to damages under Title VII of the Civil Rights Act of 1964); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (arbitration pursuant to a collective bargaining agreement does not bar a claim under the Fair Labor Standards Act); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984) (claim under the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, not barred by prior arbitral award); and of course, *Wilko v. Swan*, 346 U.S. 427 (1953). *Mitsubishi*, 473 U.S. at 647-50. Although the majority disagreed with the conclusion asserted in the dissent, it did not discuss the first three cases relied on by the dissenters.

42. *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987).

43. *Id.* at 234-242. In thus abandoning the distinction between international and domestic arbitration introduced by *Scherk*, the Court rejected an approach common to the law of major commercial nations, which enshrines that distinction. For example, Title Five of the French New Code of Civil Procedure (Articles 1492-97) establishes a separate regime for international arbitration, largely freeing it from constraints imposed on domestic arbitration. Translated in J-L DELVOLVÉ, *supra* note 14, at 83-84 (1982). The English Arbitration Act of 1979 permits only parties to non-domestic arbitration agreements (i.e., those not providing for arbitration in the United Kingdom between nationals or residents of the United Kingdom or corporations managed in the United Kingdom) to agree in advance of arbitration to exclude recourse to the English courts on questions of law. Arbitration Act, 1979, ch. 42, § 3. The new Swiss law on international arbitration (Chapter 12 of the Federal Act on Private International Law, adopted December 12, 1987) likewise distinguishes international from domestic arbitration and replaces the Concordat of 1969, which dealt with both. In the view of Professor Lalive, a principal reason for the new legislation dealing only with international arbitration was precisely that "an attempt to impose one and the same legal regime on both domestic and international arbitration could not and did not . . . prove entirely successful," contrasting international arbitration with "the

claims were viewed as no more complex than the antitrust claims held arbitrable in *Mitsubishi*. Likewise, the overlap between civil and criminal liability, the provision of a private treble damage remedy, and public interest in enforcement were no truer of RICO claims than of antitrust claims.<sup>44</sup> The Court's decision that domestic RICO claims were arbitrable was unanimous.

With respect to the arbitrability of domestic Exchange Act claims, Justice O'Connor insisted that *Wilko* must be read to hold that the arbitration agreement "was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by section 12(2) of the Securities Act."<sup>45</sup> Where, as in *Scherk*, the court can judge that "arbitration [is] an adequate substitute for adjudication as a means of enforcing the parties' statutory rights," arbitration will be compelled.<sup>46</sup> The observations in *Wilko* as to the supposed comparative insufficiencies of arbitral as against judicial procedure in the enforcement of statutory rights were characterized as reflecting "a general suspicion of arbitral tribunals — most apply with no greater force to securities disputes than to the arbitration of legal disputes generally."<sup>47</sup> Furthermore, the Court noted that these supposed deficiencies had been subsequently rejected as a basis for holding claims to be non-arbitrable.<sup>48</sup>

In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision . . . . Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights . . . . Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.<sup>49</sup>

The most recent chapter in this saga is represented by the Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>50</sup> announced on May 15, 1989. The District Court had ordered arbitration of the plaintiffs' Exchange Act claims, but denied arbitration of Securities Act claims on the strength of *Wilko*. The Court of Appeals reversed as to the Securities Act claims on the ground that *Wilko* had been rendered "obsolete" by the Supreme Court's subsequent decisions.<sup>51</sup> The Supreme Court affirmed the Court of Appeals' decision by a vote of five to four in an opinion by Justice

---

need for a fairly strict regulation of domestic arbitration, for imperative provisions limiting the parties' autonomy and for sufficient possibilities of appeals to State courts against arbitral decisions." Lalive, *The New Swiss Law on International Arbitration*, 4 *ARB. INT'L* 2, 4 (1988).

44. Justice O'Connor contrasted the often nation-wide impact on national markets of an antitrust violation with the sharply diminished public interest in enforcement of "run-of-the-mill civil RICO claims brought against legitimate enterprises." 482 U.S. at 242.

45. *Id.* at 229.

46. *Id.*

47. *Id.* at 231.

48. *Id.* at 232.

49. *Id.* (citations omitted).

50. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 109 S.Ct. 1917 (1989).

51. *Rodriguez de Quijas v. Shearson/Lehman Bros., Inc.*, 845 F.2d 1296 (5th Cir. 1988).

Kennedy that expressly overruled *Wilko*. The majority identified *Wilko* with "the outmoded presumption of disfavoring arbitration proceedings"<sup>52</sup> and stated that to leave *Wilko* outstanding in light of the subsequent decision in *McMahon*, holding claims under the Exchange Act to be arbitrable, "makes little sense for similar claims, based on similar facts, which are supposed to arise under a single federal regulatory scheme."<sup>53</sup> Justice Kennedy's opinion ended with the observation that "[o]ur conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to the petitioners under the Securities Act."<sup>54</sup>

Explicit in the rationale of these decisions is the proposition that arbitration would not be enforced if the arbitral process were not adequate to the task. One would thus be justified in concluding that these decisions constitute a definitive rejection of the supposed inadequacies of the arbitral as compared to the judicial process. Given the limited judicial review of awards, it would hardly make sense to insist upon enforcement of agreements to arbitrate if the arbitral process to which courts are thus required to defer were viewed as fundamentally incapable of doing justice.

### III.

#### *MCDONALD AND BYRD: THE UNCERTAIN EFFECT OF AN ARBITRAL AWARD*

In the context of these expressions of confidence in the arbitral process, the doubts on that same subject reiterated in another line of recent Supreme Court decisions pose something of a conundrum. To be sure, the major pronouncement addressed the effect to be given to an arbitral award issued under provisions of a collective bargaining agreement,<sup>55</sup> and labor arbitration is a distinguishable subject matter. Labor arbitration is excluded from the coverage of the Federal Arbitration Act,<sup>56</sup> and its special role in preserving industrial peace has been noted.<sup>57</sup> Nevertheless, reasoning offered by the Court for a decision must be presumed to reflect a considered judgment, and the Court has not always distinguished doctrines developed in labor arbitration cases

---

52. 109 S.Ct. at 1920.

53. *Id.* at 1922.

54. *Id.* The brief dissent by Justice Stevens, with whom Justices Brennan, Marshall and Blackmun joined, made the sole point that it was not for the judicial branch to overrule *Wilko* when Congress had let it stand for 35 years as an authoritative construction of the statute. *Id.* at 1923. The dissent characterized the refusal of the Court of Appeals to follow controlling precedent as "an indefensible brand of judicial activism." *Id.*

55. *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984).

56. Section 1 of the Federal Arbitration Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1982).

57. Arbitration under labor contracts is an aspect of the grievance procedure which is "a part of the continuous collective bargaining process." *United Steelworkers of America v. Gulf & Warrior Navigation Co.*, 363 U.S. 574, 581 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

from those more generally applicable to arbitration.<sup>58</sup> Thus, while the decision in *McDonald*, the most recent in the line of "labor cases," was fully justified on the facts of the case, the rationale of the decision went far beyond the needs of the moment, perhaps because it was intended by some Justices as a contribution to internal Court debate on expansion of the scope of arbitrability.<sup>59</sup> How broadly the decision is to be read thus remains a question, now that expansion of the scope of arbitrability appears to be established law. The later statements in *Dean Witter Reynolds, Inc. v. Byrd*<sup>60</sup> are likewise technically distinguishable jurisprudence, a discussion of what the district courts must do to preserve the substance of exclusive federal jurisdiction of Exchange Act claims having been rendered academic by the decision in *McMahon* which held that such claims are arbitrable. The language of that decision, however, is likewise broad, and it remains a question how much weight should be given to the rationale.

#### A. *McDonald and Byrd*

At issue in *McDonald* was the effect, if any, to be given to the award of a labor arbitrator upon the employee's subsequent suit under the Ku Klux Klan Act<sup>61</sup> for damages for discharge allegedly because of his exercise of First Amendment rights. The submission to arbitration was made under the terms of a collective bargaining agreement between the City of West Branch, Michigan, and Local 7935 of the United Steelworkers Union.<sup>62</sup> *McDonald*, a policeman and a member of the union, had been discharged on five asserted grounds. The issue framed by the union in its arbitration submission was

---

58. See, for example, the reliance on *McDonald* in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), a securities case, and the citation in *Mitsubishi* of one of the Steelworkers Trilogy in support of the construction of the Federal Arbitration Act. 473 U.S. at 626.

59. The chronology is suggestive. The decision of the Court of Appeals in *Mitsubishi*, reversing the District Court which had enforced arbitration in reliance on *Scherk*, was handed down on December 20, 1983. 723 F.2d 155. This preceded the argument of *McDonald* (on February 27, 1984) by two months and the decision (on April 18, 1984) by nearly four months. The *certiorari* petition on *Mitsubishi* was filed on March 19, 1984.

60. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

61. 42 U.S.C. § 1983 (1982).

62. Joint Appendix at 29, reprinted in B.N.A., Law Reprints, U.S. Supreme Court Records and Briefs [hereinafter Joint Appendix]. Section 21.1 of article XXI of the contract established a grievance procedure in five stages, beginning with informal discussion of the grievance with the employee's supervisor, thorough consideration of the grievance, reduced to writing, by the Union Grievance Committee, presentation of an approved grievance to the City Council Committee or directly to the city department head, appeal to the City Council itself, referral to state labor mediation, and only as a last resort "binding arbitration." *Id.* at 47-48. The contract stated that "[t]he arbitrator selected shall have authority only to interpret and apply the provision of this Agreement to the extent necessary to decide the submitted grievance and shall not have authority to alter, add to, delete from, disregard or amend any of the provisions of this Agreement. The decision of the arbitrator shall be final and binding on the parties." *Id.* at 32. The "parties" to the contract were the union and the city. "Grievance" was limited to "a complaint which involves the interpretation or application of, or compliance with the provisions of this Agreement." *Id.* at 47.

whether any of these grounds was a sufficient basis for “proper discharge” under the contract.

A hearing was held before the arbitrator, at which counsel for the city and the union appeared, and a transcript was made. The arbitrator thereafter rendered a written decision, reviewing each of the five charges in light of the evidence. The decision sustained only the charge of sexual misconduct. On that issue the arbitrator resolved the conflicting testimony of McDonald and the complaining witness, who was cross-examined, and concluded that discharge was the only appropriate remedy for the offense.<sup>63</sup>

McDonald did not seek review of the decision — as he was not a party, it was not at all clear that he would have been able to appeal the decision on his own — and the City did not seek judicial confirmation. Instead, McDonald sued for damages under 42 U.S.C. 1983, claiming a deprivation of rights under the First, Fifth, and Fourteenth Amendments and demanding reinstatement, back-pay, accrued benefits, and actual and punitive damages of \$500,000.<sup>64</sup> The theory of the complaint was that the asserted grounds for discharge were simply pretexts. McDonald charged that the real motivation for his discharge was retaliation for his union-organizing efforts and for his exercise of free speech rights to criticize and embarrass the police chief and to support a candidate for sheriff opposing the incumbent. The District Court refused to sustain a *res judicata* defense based on the arbitral award.<sup>65</sup> The jury, in a special interrogatory, found that the police chief had discharged McDonald in retaliation for his union activity, and awarded him \$4,000 as compensatory damages and \$4,000 as punitive damages.<sup>66</sup>

On appeal by the City and the police chief, the Court of Appeals for the Sixth Circuit reversed in an unpublished decision, holding that the District Court should have applied *res judicata* and collateral estoppel principles to dismiss McDonald's action.<sup>67</sup> The Court of Appeals held that it was clear from the arbitrator's award that he had found that the reason for the dismissal was the sexual misconduct claim. Given that the parties had agreed to settle the dispute by arbitration and that no abuse of that process was shown, the Court held that the result of the arbitration should not have been disturbed. Judge Merritt concurred to explain that the police chief was in privity with the City and entitled to the benefit of the arbitral decision.<sup>68</sup>

---

63. *Id.* at 37-38, 42-43.

64. Plaintiff's Complaint (filed November 19, 1979), *reprinted in* B.N.A., Law Reprints, U.S. Supreme Court Records and Briefs.

65. Petition for Certiorari, Appendix B — Judgment of the U.S. District Court at A6, *reprinted in* B.N.A., Law Reprints, U.S. Supreme Court Records and Briefs.

66. Petition for Certiorari, Appendix F — Special Interrogatory Form Regarding Defendant Longstreet, at A15-A16.

67. Petition for Certiorari, Appendix A — Opinion of the U.S. Court of Appeals at A1-A5. The fact of the reversal is reported at 709 F.2d 1505.

68. Petition for Certiorari, Appendix A — Opinion of the U.S. Court of Appeals at A4.

The Supreme Court unanimously reversed in an opinion by Justice Brennan.<sup>69</sup> The result reached can be readily accepted for reasons specific to the class of cases concerned — arbitration of a labor grievance pursuant to a collective bargaining agreement. Even if, as the Court had held in *Allen v. McCurry*,<sup>70</sup> general rules of preclusion apply in Section 1983 cases, that proposition would not require or permit preclusion in these circumstances. The parties to the arbitration agreement and the submission were the union and the employer, not the employee; the conduct of the arbitration was in the hands of the union; and the employee, not a party, had evidently no right to pursue judicial review of an award unfavorable to his grievance. Furthermore, it is not clear that the arbitrator considered, or was asked to consider, anything other than whether the evidence sustained the asserted grounds for discharge and, if so, whether under the labor contract the ground established justified dismissal as “proper.” The issue at the trial, on the other hand, was the question whether the grounds asserted were in truth the real motivation for the discharge. It was thus unclear that this issue was, or could have been, raised or decided in the arbitration. If not, preclusive effect would have been properly denied on familiar grounds.<sup>71</sup>

Justice Brennan’s opinion, however, relied on the foregoing analysis obliquely and only in part. Much of the opinion was not confined either in concept or language to a consideration of the interplay between an individual’s enforcement of a statutory implementation of constitutional rights and the special circumstances of arbitration under a collective bargaining agreement. The Court quickly concluded that the District Court had not been required to accord a statutory full faith and credit<sup>72</sup> to an unconfirmed arbitral award, as arbitration is not a “judicial proceeding.”<sup>73</sup> The Court then held that it was inappropriate for the Court of Appeals to have fashioned a judicial rule of preclusion, because “arbitration could not provide an adequate substitute for judicial proceedings” under the statute.<sup>74</sup> The Court cited the following factors in justification of this holding:

(1) The arbitrator may lack “the expertise required” to resolve questions arising in a Section 1983 case, especially since many arbitrators are not lawyers.<sup>75</sup>

---

69. 466 U.S. at 285.

70. *Allen v. McCurry*, 449 U.S. 90 (1980).

71. It is fundamental to collateral estoppel or issue preclusion that the issue in question was “actually and necessarily determined” in the prior litigation. See, e.g., *Montana v. United States*, 440 U.S. 147, 164 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1981).

72. 28 U.S.C. § 1738 (1982).

73. This conclusion rested on *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982). See also *McDonald*, 466 U.S. at 287-88.

74. 466 U.S. at 289 (relying heavily on similar observations on the same subject in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)).

75. 466 U.S. at 290.

(2) The arbitrator's authority "derives solely from the contract"; he may not therefore have authority to enforce Section 1983. The opinion suggested, indeed, that, if the award were based on "the requirements of enacted legislation" rather than on interpretation of the contract, the arbitrator would have exceeded his authority and the award would not be enforced.<sup>76</sup>

(3) The union customarily has exclusive control of the presentation of the case, as it had in *McDonald*, and its interests may not coincide with those of the employee.<sup>77</sup>

(4) "Arbitral fact-finding is generally not equivalent to judicial fact-finding".<sup>78</sup> (i) the record is not as complete (a comment seemingly inapplicable to *McDonald*, where in fact there was a transcript of the proceedings, quoted from at length in the arbitrator's decision);<sup>79</sup> (ii) the usual rules of evidence do not apply; and (iii) "the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."<sup>80</sup>

The reliance in *McDonald*, in refusing to give any preclusive effect to the award, upon differences between arbitral and court procedure that are not confined to labor arbitration (all arbitrators derive their authority from contract, not all arbitrators are lawyers, and arbitral procedure is not identical with court adjudication)<sup>81</sup> casts a shadow over the preclusive effect of arbitral awards generally. This shadow was lengthened by the opinion of Justice Marshall in *Dean Witter Reynolds, Inc. v. Byrd*,<sup>82</sup> decided a year after *McDonald* and three months prior to the decision in *Mitsubishi*. At issue in *Byrd* was the disposition to be made of a federal court complaint raising both Exchange Act claims, then non-arbitrable,<sup>83</sup> and pendant state law claims, under a contract requiring arbitration of disputes.<sup>84</sup> Justice Marshall noted that some federal courts had conceived that they had discretion in such a case to refuse enforcement of arbitration and to require that all issues be tried to the court when they arose out of the same transaction and were "sufficiently intertwined factually and legally."<sup>85</sup> This doctrine of "intertwining" had

---

76. *Id.* at 290-91.

77. *Id.* at 291.

78. *Id.*

79. Joint Appendix, *supra* note 62, at 30-44.

80. 466 U.S. at 291 (quoting from *Gardner-Denver*, 415 U.S. at 57-58).

81. See *infra* notes 145-77 and accompanying text.

82. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

83. The claims were then non-arbitrable under *Wilko* and its extension by lower federal courts to claims under the Exchange Act. See the dissent of Justice Stevens in *McMahon*, noting that in the thirty-two years immediately following the decision in *Wilko* all eight of the circuits before which the question had come had held the *Wilko* rationale to preclude arbitration of claims under the Exchange Act. 428 U.S. at 268.

84. The brokerage house defendant in *Byrd* had not sought arbitration of the Exchange Act claims in the suit, evidently on the basis that under an extension of the *Wilko* doctrine such claims were not arbitrable in a domestic context, even though the court in *Scherk* had held them arbitrable in the international context. See 470 U.S. at 215. Justice White's concurring opinion in *Byrd* foreshadowed the decision in *McMahon* two years later. 470 U.S. at 224.

85. 470 U.S. at 216-17.

been developed out of concern for the possible preclusive effect of arbitral decisions on non-federal claims pertinent to issues thought to be reserved exclusively for federal court determination.<sup>86</sup> Other circuits had concluded, on the contrary, that the Federal Arbitration Act divested the district courts of any discretion to deny or defer arbitration and required enforcement of the arbitration agreement as to the non-federal claims.<sup>87</sup>

The Supreme Court agreed with the latter approach and rejected the doctrine of intertwining. The legislative history of the Federal Arbitration Act was found to express a dominant congressional intent to enforce arbitration agreements. Therefore, district courts must not "allow the fortuitous impact of the [Federal Arbitration] Act on efficient dispute resolution to overshadow the underlying [congressional] motivation."<sup>88</sup> Furthermore, the concern for the collateral estoppel effect of arbitral proceedings on a subsequent federal securities case was held to be unfounded because "the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest . . . . [T]he consequence of this misconception has been the formulation of unnecessarily contorted procedures."<sup>89</sup> Justice Marshall noted that where the federal claim is not arbitrable, *McDonald* had shown that it is "far from certain" that arbitral findings have any preclusive effect.<sup>90</sup> He stated further that "*McDonald* . . . establishes that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding." The Courts of Appeals that have refused enforcement of arbitration and required all issues to be tried in court on the assumption that federal courts must give collateral-estoppel effect to arbitration proceedings have "sought to accomplish indirectly that which they erroneously assumed they could not do directly."<sup>91</sup>

The precise import of this teaching is far from clear, for *McDonald* found arbitral procedure so deficient that no preclusive effect at all was given to the award in that case. If the special characteristics of labor arbitration were decisive for that conclusion, the *Byrd* opinion reveals no trace of it, and

---

86. For a discussion of the preclusive effect to be given to arbitral awards in subsequent federal securities litigation, see, Note, *The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities and Exchange Act of 1934*, 46 N.Y.U. L. REV. 936 (1971) (discussing state court judgments as well as arbitral awards); and Friedman, *The Preclusive Effect of Arbitral Determinations in Subsequent Federal Securities Litigation*, 55 *FORD. L. REV.* 655 (1987).

87. 470 U.S. at 217.

88. *Id.* at 220. The opinion stated that this conclusion was compelled by the Court's recent decision in *Moses H. Cone Memorial Hosp.*, 460 U.S. at 20, which had explicitly recognized that enforcement of an arbitration agreement might result in duplicative bifurcated proceedings. *Id.* at 220-21.

89. *Id.* at 222. No authority was cited for this pronouncement.

90. *Id.*

91. *Id.* at 223. Justice Marshall added that of course the preclusive effect, if any, of the arbitral proceedings in *Byrd* was a question that could arise only after decision of them, and the Court did not consider "whether the analysis in *McDonald* encompasses this case. Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interest warranting protection." *Id.*

the arbitration pertinent to the class of securities cases with which *Byrd* was concerned is not labor arbitration at all.

### B. *The Clash of Rationales*

When *McDonald* and *Byrd* were decided, the arbitration of federal statutory claims was narrowly confined to the "international exception" created by *Scherk*, although the application for certiorari in *Mitsubishi* presaged renewed debate over the limitations to arbitrability that had been erected.<sup>92</sup> Within little more than two years, this edifice was largely dismantled.<sup>93</sup> In *Mitsubishi*, the *McDonald* rationale, relied on by the dissenters to oppose the extension of the arbitrability of statutory claims,<sup>94</sup> was directly at issue. The *Mitsubishi* opinion refuted point by point the supposed deficiencies of the arbitral process which the *McDonald* court had offered as reasons for denying preclusive effect to an arbitral award:

(1) *Expertise*. *McDonald* had expressed concern that arbitrators may lack "the expertise required" to deal with the asserted complexities of a Section 1983 claim<sup>95</sup> — in the particular case, a determination of the dominant motive for the discharge of an employee. In *Mitsubishi*, in contrast, "adaptability and access to expertise" were seen as "hallmarks of arbitration,"<sup>96</sup> permitting one to refer to arbitration, with full confidence, the almost surely greater complexity of an antitrust case, where determination of motive and purpose were likewise in issue.<sup>97</sup>

(2) *Limitations imposed by contractual authority*. In *McDonald*, Justice Brennan had questioned whether an arbitral award that reflected legislative requirements rather than an interpretation of the contract would be valid.<sup>98</sup> In *Mitsubishi*, the Court saw "no reason to assume at the outset of the dispute

---

92. See *supra* note 59 and accompanying text.

93. It was suggested after *McMahon* that *Wilko* still barred arbitration of claims under Section 12(2) of the Securities Act. See Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. REV. 623, 639 n.84 (1988). The recent decision in *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 109 S.Ct. 1917 (1989), overruling *Wilko*, terminates that debate.

94. 473 U.S. at 650. Justice Brennan, author of the *McDonald* opinion, and Justice Marshall, author of the *Byrd* opinion, both joined the dissent in *Mitsubishi*. Justice Marshall, however, did not join that part of the dissent which would have put all statutory claims beyond the reach of the Federal Arbitration Act. *Id.* at 640. Both justices also dissented on the Exchange Act issue in *Byrd* (the Court was unanimous on the arbitrability of RICO claims) and from the decision in *Rodriguez* overruling *Wilko*. Both Justice Brennan and Justice Marshall had also joined the sharp dissent of Justice Douglas in *Scherk*. On the other hand, the *McDonald* and *Byrd* decisions were unanimous (Justice White filed a concurring opinion in *Byrd*, although he explicitly "join[ed] the Court's opinion," 470 U.S. at 224). Thus the precise differences of view among the justices as to the proper scope of arbitrability are unclear.

95. See *supra* note 75 and accompanying text.

96. 473 U.S. at 633.

97. *Id.* Soler's antitrust claim was primarily that Mitsubishi and Chrysler had acted to cut Soler off in order to protect the U.S. market from lower-priced competition. The defendants offered the explanation that Soler's contractual defaults justified the action. *Id.* at 618-20.

98. 466 U.S. at 290-91.

that international arbitration will not provide an adequate mechanism" for the enforcement of a party's rights under U.S. antitrust legislation. That the contract itself was governed by Swiss law and provided for arbitration in Japan under the auspices of the Japan Commercial Arbitration Association, made no difference.<sup>99</sup> The court stated:

To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which include, as in these cases, those arising from application of American antitrust law, the tribunal therefore should be bound to decide the dispute in accord with the national law giving rise to the claim.<sup>100</sup>

(3) *Arbitral Procedure.* *McDonald* had posed the differences between judicial and arbitral procedure as establishing the inappropriateness of arbitration of a statutory claim.<sup>101</sup> *Mitsubishi*, in contrast, expressed doubt that antitrust claims are "inherently unsusceptible to resolution by arbitration."<sup>102</sup> The opinion pointed out that even courts that refused to enforce agreements to arbitrate future antitrust claims accepted arbitration as appropriate for existing disputes and that the procedures are the same in either case.<sup>103</sup> This theme was developed at great length in Justice O'Connor's opinion for the Court in *McMahon* where she reviewed the litany of objections to arbitral procedure expressed in *Wilko*. She concluded, as noted above,<sup>104</sup> that these

---

99. 473 U.S. at 636, 637 n.19.

100. *Id.* at 636-37. Inasmuch as *Mitsubishi* had agreed that American law must apply to govern the antitrust dispute, the Court had no occasion to consider a case where that was resisted, beyond observing that "in the event the choice-of-forum and choice-of-law clauses operate in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637, n.19. It also thought that review of any resulting arbitral award consistent with the standards of the New York Convention would suffice "to ascertain that the [arbitral] tribunal took cognizance of the antitrust claims and actually decided upon them." *Id.* at 638.

It has been questioned whether an award in circumstances similar to *Mitsubishi* would be enforced, that is, where a contract required application of the law of State A (Swiss law in *Mitsubishi*) but an imperative norm was established by the law of State B (American antitrust law). See Carbonneau, *Mitsubishi: The Folly of Quixotic Internationalism*, 2 *ARB. INT'L* 116 (1986). The problem is probably a good deal more theoretical than real. A party raising a statutory claim in arbitration will surely insist on the application of the legal regime creating the claim. An American antitrust claim judged by internal Swiss law is nonsense. If the party against which the statutory claim is raised seeks arbitration of the claim, it will almost necessarily have to accept the application of the law creating the statutory claim, as *Mitsubishi* did, as the minimum price for securing enforcement of arbitration. Thus, both parties will have agreed to the application of that law to the claim. The contractual character of the authority of the arbitrators is thus not compromised if they apply the law of State B, for application of that law to the statutory claim will follow from the supplemental agreement of the parties.

101. 466 U.S. at 291. See *supra* notes 78-80 and accompanying text.

102. 473 U.S. at 633.

103. *Id.*

104. See *supra* note 47 and accompanying text.

points simply reflected a no longer acceptable general suspicion of arbitration.<sup>105</sup>

The clash of rationales between *McDonald-Byrd*, on the one hand, and *Mitsubishi-McMahon*, on the other, creates at a minimum a doctrinal incoherence. In *McDonald*, a statutory claim was held by a unanimous Court to require *de novo* determination by a federal court because arbitral procedure exhibits marked deficiencies. The rationale of *McDonald* was then applied in *Byrd* to suggest that manipulation of preclusion doctrine is required and available to protect a wholly different set of statutorily-based interests. In *Mitsubishi*, a more complex and equally statutory claim under the antitrust laws was held to be arbitrable in part precisely because arbitration can be relied on to deal adequately with such issues. In *McMahon*, the distinction for purposes of arbitrability between international and domestic claims was effectively eliminated, and the very class of cases on which *Byrd* imposed the suspicions of *McDonald* was held to be arbitrable — again in critical part because of the perceived adequacy of the arbitral process. Although neither *Mitsubishi* nor *McMahon* had occasion to address directly the preclusive effect of an award, the *Mitsubishi* decision did expressly note that the limited review of an international award permitted by the New York Convention will be adequate to protect the important interest reflected in American antitrust law.<sup>106</sup>

Although the two lines of cases are distinguishable, the language employed in these decisions cannot responsibly be deprived of its import simply because they are distinguishable. Unless and until these two views of the arbitral process are explicitly reconciled by the Court, the *McDonald-Byrd* rationale poses a threat to the results of international arbitration in U.S. courts by suggesting a suspicion of the arbitral process that is inconsistent both with long-established decisional law and with the actual practice of international commercial arbitration. *McDonald* and *Byrd* ignored that case law, and the commentary on arbitral procedure offered in *McDonald* seriously misconceives the international arbitral process.

### C. *The Departure from Common Law Doctrine Reflected in McDonald*

The *McDonald* opinion observed that because federal courts were not required by statute to give preclusive effect to an arbitral award that had not been judicially confirmed, “any rule of preclusion would necessarily be judicially fashioned.”<sup>107</sup> Justice Brennan put the question for decision as “whether it was appropriate for the Court of Appeals to fashion such a

---

105. 482 U.S. at 231-32.

106. 473 U.S. at 637 n.21. For a discussion of the so-called “second look” doctrine and whether it comports with the limited review permitted under the New York Convention, see Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BKLYN. J. INT’L L. 628, 640-51 (1986).

107. 466 U.S. at 288.

rule,"<sup>108</sup> implying that in formulating any such rule the courts would be introducing an innovation into the law. Such an implication is wholly inaccurate as a statement of decisional law concerning the effect of arbitral awards generally. The question should have been turned around to ask what there was in the circumstances of the *McDonald* case that made it inappropriate for the Court of Appeals to apply a judicially-fashioned rule of preclusion that had been applied and acknowledged for more than a century<sup>109</sup> by a great many courts, including on at least one occasion, the Supreme Court itself.<sup>109</sup> Had the award in *McDonald* been appropriate for application of a preclusionary rule, a long history of established precedent could have been called upon in support.

Although U.S. courts had refused to compel arbitration prior to the legislative reversal in the 1920's, they were not inhospitable to the enforcement of arbitral awards. On the contrary, arbitral awards were viewed as the substantial equivalent of judicial decisions and were routinely given preclusive effect. The view taken of the function of the arbitrator may be illustrated by the decision of the New York Court of Appeals in 1875 in *Fudickar v. Guardian Mutual Life Insurance Company*.<sup>110</sup> The dispute between the parties, which arose out of the plaintiff's discharge as an insurance agent and his claim for unpaid commissions, had been submitted to arbitration. The plaintiff sought to overturn the arbitral award which had found him guilty of misconduct and held his dismissal to be justified. In refusing to set aside the award, the court stated:

It is the general doctrine pervading our jurisprudence on the subject that the decision of an arbitrator in a matter within his jurisdiction is final and conclusive between the parties . . . . The arbitrator is a judge appointed by the parties; he is by their consent invested with judicial functions in the particular case; he is to determine the right as between the parties in respect to the matter submitted, and all questions of fact or law upon which the right depends are, under a general submission, deemed to be referred to him for decision.<sup>111</sup>

It is not the purpose of this article to attempt an exhaustive study of the historical evidence for the application of the doctrine that parties to an arbitration may not relitigate issues decided by the award. Even a brief review of the digests discloses dozens of pertinent decisions. For present purposes a selection will suffice to show the established rule. What was revolutionary in *McDonald* was the suggestion, reinforced by the statements in Justice Marshall's opinion in *Byrd*, that the characteristics of the arbitral process imply or require the conclusion that the preclusive effect of an arbitral award is at best doubtful.

---

108. *Id.*

109. *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 97 (1845). See also *infra* notes 130-36 and accompanying text.

110. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392 (1875).

111. *Id.* at 400.

New York decisions even earlier than *Fudickar* reflect application of what in modern terms would be called "claim preclusion." For example, in 1805 in *Purdy v. Delavan*,<sup>112</sup> it was held that a prior award on a submission of a tort claim to arbitration precluded judicial action and required reversal of a jury verdict for the plaintiff. In *Shepard v. Watrous*,<sup>113</sup> the preclusionary effect of an arbitration award was recognized as justifying the exclusion of evidence pertaining to the matter submitted to arbitration. Judge Thompson explained the result in this language:

There is no rule better settled, or more consonant to good sense, than that which precludes parties from litigating on the original subjects of dispute, which have been fairly and legally submitted to judges of their own choosing, and an award made pursuant to such submission.<sup>114</sup>

A decade later, the New York court held that an award precluded further suit where the plaintiff had neglected to submit certain claims to an arbitration of all demands. Thus, the award was held conclusive not merely as to what was submitted, but also as to what might have been submitted. The court thought it would be a "very dangerous precedent" to allow a party to a broad submission to arbitration to withhold some of his claims for later court litigation.<sup>115</sup> The rule that an arbitral award barred a court suit on the same cause of action was thus well established,<sup>116</sup> and the New York court went far in equating the scope of an arbitral award with that of a court judgment in barring relitigation:

There is, or ought to be, no difference in the effect of an adjudication, as a bar to a subsequent suit, for the same cause, whether it is pronounced by judges selected by the parties or appointed by the state. In either case, every consideration of public policy requires, that after the parties have been fully and fairly heard, further litigation as to the same matters should cease . . . .<sup>117</sup>

Decisions elsewhere were in general accord with the common law jurisprudence reflected in these New York cases. Thus, in *Dutton v. Gillet*,<sup>118</sup> the

112. *Purdy v. Delavan*, 1 Cai. R. \*304 (1805).

113. *Shepard v. Watrous*, 3 Cai. R. \*166 (1805).

114. *Id.* at 168.

115. *Wheeler v. Van Houton*, 12 Johns. 311, 313 (1815). *Accord Gardner v. Oden*, 24 Miss. \*382, \*385 (1852).

116. See *Armstrong v. Masten*, 11 Johns. \*189 (1814), which held that an arbitral award barred a civil suit on the same claim even if performance of the award was not pleaded by the party relying on it. A jury verdict for the plaintiff on the original cause of action was reversed. See also *Garr v. Gomez*, 9 Wend. 649 (1832), a decision by the Court for the Correction of Errors, in which an arbitral award was held conclusive of the identity of the proper holders of certain bills of exchange. "The award is conclusive of the liability to pay Gomez, and the defendant cannot be admitted to raise a question which is rendered *res judicata* by the award." *Id.* at 666.

117. *Brazil v. Isham*, 12 N.Y. 9, 15 (1854) (Gardiner, C.J.). More than a century later, the New York Court of Appeals continued to express the same view: "Fundamental to our consideration of the present appeal is recognition that in general the doctrines of claim preclusion and issue preclusion between the same parties . . . apply as well to awards in arbitration as they do to adjudications in judicial proceedings." *American Ins. Co. v. Messinger*, 43 N.Y.2d 184, 189-90, 371 N.E.2d 798, 801, 401 N.Y.S.2d 36, 39 (1977) (citations omitted).

118. *Dutton v. Gillet*, 5 Conn. 172 (1823).

Connecticut court held that an arbitral award fixing the parties' respective rights to the flow of a stream "so far as it extends will be conclusive upon the matter in controversy in any action for enforcement of the rights established." In *Sears v. Vincent*,<sup>119</sup> the Massachusetts Supreme Judicial Court held that an award in a controversy over an alleged right-of-way and a claimed assault and battery was a conclusive determination that the defendant was not at fault. To the plaintiff's objection that the award had not been ratified (the "unappealed award" in Justice Brennan's phrase in *McDonald*<sup>120</sup>), the Court answered that "the award being valid needed no ratification."<sup>121</sup>

In *Smith v. Douglass*,<sup>122</sup> the Illinois Supreme Court held that an oral award on an oral submission to arbitration "may be enforced by action, or set up by way of defense" to judicial litigation on the same claim.<sup>123</sup> In a later case, the Illinois court stated that "an award was a full and final adjustment of the controversy, having all the force of an adjudication and effectually concluding the parties from again litigating the same subject."<sup>124</sup>

The same view of the matter was expressed by the Kentucky court in *Bogard v. Boone*,<sup>125</sup> affirming judgment in a suit to enforce an arbitral award. The court stated that "[t]he general rule with respect to an award is that it is binding and efficacious within the scope of the articles of arbitration as a judgment of a regularly constituted civil court."<sup>126</sup>

A Massachusetts case, *Prentiss v. Wood*,<sup>127</sup> is an early example of the application of collateral estoppel to an award. In 1876, the plaintiff had sued Wood in contract and in tort for damages to the plaintiff's mill from flooding caused when Wood raised the height of his dam. The parties to that suit submitted to three referees "all matters covered by the suit,"<sup>128</sup> and the result was an award of damages to the plaintiff for the period of limitations measured from the date suit was commenced. In the subsequent suit, the plaintiff claimed damages accruing from the date of the earlier suit both against the

---

119. *Sears v. Vincent*, 90 Mass. (8 Allen) 507 (1864).

120. 466 U.S. at 288.

121. 90 Mass. (8 Allen) at 511. See, for example, Article 1476 of the French New Code of Civil Procedure which accords a *res judicata* effect to an arbitral award as to the matters decided as soon as the award is announced. Translated in J-L DELVOLVÉ, *supra* note 14, at 75 (1982).

122. *Smith v. Douglass*, 16 Ill. \*34 (1854).

123. *Id.* at \*35.

124. *White Eagle Laundry Co. v. Slawek*, 296 Ill. 240, 244, 129 N.E. 753, 755 (1921) (citing *Smith v. Douglass*, 16 Ill. 34 (1854)). To the same effect is the observation of the Vermont court in *Harris v. Harris's Estate*, 82 Vt. 199, 214, 72 A. 912, 918, (1909) ("It is beyond question that as to matters submitted, an award duly made and published [by an arbitrator] has the binding force of a judgment."), and the decision of the New Jersey court in *Young v. Society of the First Congregational Church of Verona*, 91 N.J.L. 310, 102 A. 358 (1917) (precluding party from additional claims for damages where the parties had previously submitted all matters in dispute to arbitration).

125. *Bogard v. Boone*, 200 Ky. 572, 255 S.W. 112 (1923).

126. *Id.* at 576, 255 S.W. at 114.

127. *Prentiss v. Wood*, 132 Mass. 486 (1882).

128. *Id.* at 487.

defendant and the defendant's successor in ownership. Verdicts were directed for the plaintiff on the basis of the award and exceptions were overruled. The Supreme Judicial Court affirmed in an opinion by Chief Justice Morton. Given the evidence that the height of the dam was then as it had been at the time of the first suit, the defendant could not raise the issue of whether or not he had the right to maintain the dam at that height for the award had necessarily held it to be a nuisance. The court held that defendants "cannot now reopen and retry the same question."<sup>129</sup>

This brief summary of early law establishing the preclusive effect of arbitral awards would be incomplete without reference to Chief Justice Taney's decision in *Kendall v. Stokes*.<sup>130</sup> At issue in that case was a long-simmering dispute over the claimed unlawful failure of the Postmaster General to credit plaintiffs with sums allegedly due in connection with contracts to transport mail. In the course of the controversy, Congress enacted a private bill referring the matter for decision to the Solicitor of the Treasury, to which reference the plaintiff assented. The Solicitor awarded the plaintiff \$162,000, which had been collected. The plaintiff then sued for additional damages assertedly arising out of the same transactions and won a jury verdict. In reversing the judgment, Chief Justice Taney held that the rule was well settled that a plaintiff may not, after a reference and award, maintain a suit on the original cause of action upon the ground that he had not proved all the damages he had sustained or that his damages exceeded the amount awarded by the arbitrator.<sup>131</sup>

One may, indeed, cite much more recent Supreme Court recognition and seeming approval of the doctrine according preclusive effect to arbitral awards. In *United States v. Utah Construction and Mining Co.*,<sup>132</sup> one question at issue was the collateral estoppel effect to be given to certain findings of an administrative agency acting in a quasi-judicial function in a controversy arising under a contract with the Atomic Energy Commission. In the course of processing the contractor's claims, the Advisory Board of Contract Appeals had made certain factual findings, but in the contractor's subsequent suit the Court of Claims held that the administrative findings as to responsibility for construction delays were subject to *de novo* determination. The Supreme Court held that under the pertinent statute these administrative findings were final, noting that the result "is harmonious with general principles of collateral estoppel."<sup>133</sup> The Court stated that occasional language to

---

129. *Id.* at 488.

130. *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845).

131. *Id.* at 97.

132. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966).

133. *Id.* at 421.

the effect that *res judicata* principles do not apply to administrative proceedings "is certainly too broad,"<sup>134</sup> and referred with seeming approval to *Goldstein v. Doft*,<sup>135</sup> "where collateral estoppel was applied to prevent relitigation of factual disputes before an arbitrator."<sup>136</sup>

In *Goldstein v. Doft*, the plaintiff's suit against a partner was held to be barred by a prior adverse arbitration award upon his claim against a partnership and the corporation of which the partnership was an agent. The court held that the claim for unpaid commissions, which had been squarely presented to the arbitrators, was barred by the award.<sup>137</sup> Similarly, the plaintiff's subsequent claim of fraud against the partner, being directly related to the contract and within the scope of the arbitration clause, was for that reason barred as well.<sup>138</sup> Moreover, on the assumption, as the plaintiff contended, that the partner or the partnership was only an agent of a corporate party to the arbitration, Judge Weinfeld held that he was barred by collateral estoppel, having had a full opportunity to litigate against one of the parties.<sup>139</sup> Finally, the plaintiff's effort to recharacterize the legal theory of his court case was rejected both on the factual ground that the same theory had, in fact, been presented to the arbitrators, and on the legal ground that he could not in any event thereby avoid the *res judicata* effect of the award.<sup>140</sup>

---

134. *Id.* at 422.

135. *Goldstein v. Doft*, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd on opinion below*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966).

136. 384 U.S. at 422 (citations and footnote omitted).

137. 236 F. Supp. at 732.

138. *Id.* at 732-33.

139. *Id.* at 733.

140. Numerous federal court decisions reflect a similar application of preclusion doctrine to arbitral awards. *See, e.g.*, *Behrens v. Skelly*, 173 F.2d 715 (3rd Cir. 1949) (prior award dismissing claim against privies of the defendant bars a subsequent suit against the defendant); *Ritchie v. Landau*, 475 F.2d 151 (2d Cir. 1973) (an individual co-defendant in the subsequent suit held entitled to collateral estoppel benefit of a prior award in proceedings between the plaintiff and a corporation); *American Renaissance Lines, Inc. v. Saxis Steamship Co.*, 502 F.2d 674, 678 (2d Cir. 1974) ("Ordinarily, [a] decision by arbitrators is as binding and conclusive . . . as a judgment of a court . . .", quoting *James L. Saphier Agency, Inc. v. Green*, 190 F. Supp. 713, 719 (S.D.N.Y.), *affirmed*, 293 F.2d 769 (2d Cir. 1961)); *Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926 (7th Cir. 1986) (RICO suit held barred where the plaintiff failed to raise fraud claims in a prior arbitration between the same parties); *Maidman v. O'Brien*, 473 F. Supp. 25, 29 (S.D.N.Y. 1979) (holding arbitration award rendered in favor of defendant's principal a bar to a Securities Act claim against his agent and stating that it is "well settled that the related doctrines of *res judicata* and collateral estoppel are properly applied to arbitral decisions"); *Prodoos Marine Carriers Co. v. Overseas Shipping & Logistic*, 578 F. Supp. 208 (S.D.N.Y. 1984) (as between the same parties, an unconfirmed arbitral award entered on default but after notice and opportunity to appear is binding in a subsequent arbitration as to issue necessarily decided by the arbitrators in the first proceeding); *Murray v. Dominick Corp. of Canada, Ltd.*, 631 F. Supp. 534 (S.D.N.Y. 1986) (award against two Stock Exchange members bars a suit against their representative); *Norris v. Grosvenor Marketing, Ltd.*, 632 F. Supp. 1193 (S.D.N.Y.) (recovery in prior arbitration bars a subsequent court suit against arbitration defendant's successors in interest for additional damages for the same injury), *aff'd on this point*, 803 F.2d 1281 (2d Cir. 1986); *Gemco Latinoamerica v. Seiko Time Corp.*, 671 F. Supp. 972 (S.D.N.Y. 1987) (unexplained arbitral award rejecting all claims held to bar later assertion of an antitrust claim based on the same factual predicate, despite the fact that the antitrust claim, as such, was not raised in the arbitration).

There is no basis to believe that these decisions proceeded against a background of arbitral procedure less apt to enable a fair presentation of a case than arbitral procedures now employed. The procedures in international commercial arbitration, in particular, suggest no sound basis for departing from this established jurisprudence in considering the effect to be given to the resulting awards.

#### IV.

#### THE PROCEDURAL CHARACTERISTICS AND LEGAL REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION

As the Supreme Court recognized in *Scherk*, a measure of certainty is necessary in international commerce, which the enforcement of agreements to arbitrate helps to provide.<sup>141</sup> If, however, the effect of the resulting award must await a case-by-case analysis in U.S. courts, much may be withdrawn by the left hand that has been proffered by the right. A measure of uncertainty is, to be sure, the essence of at least the farther reaches of the current U.S. law of preclusion, even where the prior determination sought to be relied on is a domestic court judgment.<sup>142</sup> A consideration of the process of international commercial arbitration suggests, however, that no sweeping reservation of views about the effects to be given to arbitration results is justified.

At the outset of what follows, a caution must be noted. In writing about what goes on in international commercial arbitration, one is confronted by the circumstance that the confidentiality that is one of its principal attractions substantially limits available data. Except as both parties agree, the rules of the principal bodies administering international arbitrations impose confidentiality.<sup>143</sup> The publication of awards is sporadic at best, and what appears is almost always an edited version that omits much of the procedural detail needed for analysis and generalization.<sup>144</sup> It is thus inevitable that the basis

---

141. 417 U.S. at 516.

142. See *infra* notes 208-18 and accompanying text.

143. For example, Rule 4 of the Internal Rules of the ICC Court of Arbitration provides that all documents submitted to the Court are communicated only to the Court and the ICC Secretariat. Article 17, paragraph 4 of the Rules of Conciliation and Arbitration of the ICC Court of Arbitration (as effective from January 1, 1988) [hereinafter ICC Rules] provides that, except with the consent of the arbitrator and the parties, "persons not involved in the proceedings" shall not be admitted to the hearings. Article 10.4 of the Rules of the London Court of International Arbitration (effective January 1, 1985) [hereinafter LCIA Rules] likewise provide for private hearings unless the parties agree otherwise.

144. Each year since 1974, the ICC has cooperated in the publication by the *JOURNAL DU DROIT INTERNATIONAL* — CLUNET of a summary of and commentary on a few of the ICC awards rendered during the year. See 101 CLUNET 874 (Thompson and Derains, eds. 1974); 102 CLUNET 916 (Derains, ed. 1975); 103 CLUNET 968 (Derains, ed. 1976); 104 CLUNET 931 (Derains ed. 1977); 105 CLUNET 977 (Derains, ed. 1978); 106 CLUNET 989 (Derains, ed. 1979); 107 CLUNET 949 (Derains, ed. 1980); 108 CLUNET 913 (Derains, ed. 1981); 109 CLUNET 967 (Derains, ed. 1982); 110 CLUNET 889 (Derains and Jarvin, eds. 1983); 111 CLUNET 907 (Derains and Jarvin, eds. 1984); 112 CLUNET 961 (Derains and Jarvin, eds. 1985); 113 CLUNET 1093 (Derains and Jarvin, eds. 1986); 114 CLUNET 1009 (Derains and Jarvin, eds. 1987); and 115 CLUNET 1195 (Derains and Alvarez, eds. 1988). In the initial publication in this series, the editors noted that

for any discussion of the inner workings of international arbitration is a combination of the relatively few and rather broad provisions contained in the rules of administering bodies and relevant local law dealing with arbitral procedure, supplemented by individual impressions derived from personal experience and educated gossip.

This lack of information is less disabling than might be supposed, if one is willing to concede to, or indeed impose on, the parties to an international arbitration the responsibility for sufficient application in their own self-interest of the large measure of procedural freedom that modern rules and statutes accord to the participants in the arbitral process. Although contrary to some of the most profound inspirations for current substantive and procedural law — that citizens must be protected from their assumed incompetence — in allowing the usually sophisticated and experienced parties in international commercial relations to exclude court process in favor of arbitration, as the decisions expanding the scope of arbitrability have done, a large measure of procedural autonomy has necessarily been recognized.

#### A. Procedural Aspects

The first and most important ingredient of an international arbitration is precisely this measure of procedural freedom. The current rules of the ICC, for example, provide the following:

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.<sup>145</sup>

The ICC Rules themselves add some details but fall far short of anything remotely resembling the Federal Rules of Civil Procedure. The pleadings

---

none of the awards was published without the consent of the parties, even in edited form, that for the most part the awards chosen for partial publication and comment were those least subject to rules of national law, and that the editors had eliminated awards which “simply rested on the facts or gave effect to contractual provisions.” 101 CLUNET at 877. The editors added a further word of caution:

Arbitrators acting under the auspices of the Court of Arbitration of the International Chamber of Commerce do not have reciprocal information as to awards rendered by other arbitrators. The Court of Arbitration having neither the authority nor the desire to render uniform the solutions adopted by arbitrators as to the merits, at least where its own rules are not in issue, each award is thus issued without regard to others. One can thus speak only with difficulty of an arbitral jurisprudence.

*Id.*

This arbitral action in isolation has at least to some extent given way in more recent times to citation of other arbitral awards, for in 1984 the editors noted that “it is not rare that arbitrators refer to awards previously published in this Journal — or in other publications . . .” 111 CLUNET at 907. The limited extent of this publication is shown by the fact that whereas during 1987 the Court of Arbitration approved 149 partial or final awards, plus a further seventeen awards issued on consent, only four of the 1987 awards are the subject of partial publication and comment. 115 CLUNET at 1196.

145. ICC Rules, *supra* note 143, art. 11.

consist of a request for arbitration, an answer thereto which may contain counterclaims, and an optional reply to any counterclaim.<sup>146</sup> In addition, "a document defining [the arbitrator's] Terms of Reference," analogous to a pre-trial order, must be settled and signed by the parties.<sup>147</sup> Provision is made for written submissions,<sup>148</sup> and the arbitrator must hear the parties in person and together, if either requests a hearing.<sup>149</sup> The arbitrator may also hear third-party witnesses and is authorized to appoint one or more experts.<sup>150</sup> The arbitrators are to determine the language of the proceedings, "due regard being paid to all the relevant circumstances and in particular to the language of the contract."<sup>151</sup> The parties may appear in person or through agents and may be assisted by advisers.<sup>152</sup> The place of arbitration, unless agreed upon by the parties, is fixed by the ICC Court of Arbitration.<sup>153</sup> The result of the process is a written award which must address the merits of the case.<sup>154</sup> The award is subject to review as to form by the ICC Court of Arbitration before it may be signed by the arbitrators and issued to the parties.<sup>155</sup> In these respects, the ICC Rules do not differ materially from the procedures contemplated by the rules of other bodies sponsoring international commercial arbitration, such as the London Court of International Arbitration (LCIA),<sup>156</sup> and the American Arbitration Association (AAA),<sup>157</sup> or the rules proposed

---

146. *Id.* arts. 3-5.

147. *Id.* art. 13. This document "shall include:

- (a) the full names and description of the parties,
- (b) the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made,
- (c) a summary of the parties' respective claims,
- (d) a definition of the issues to be determined,
- (e) the arbitrator's full name, description and address,
- (f) the place of arbitration,
- (g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitrator to act as amiable compositeur,
- (h) such other particulars as may be required to make the arbitral award enforceable in law, or may be regarded as helpful by the Court of Arbitration or the arbitrator."

148. *Id.* art. 3, para. 2(c).

149. *Id.* art. 14.

150. *Id.* art. 14, paras. 1 and 2.

151. *Id.* art. 15, para. 3.

152. *Id.* art. 15, para. 5.

153. *Id.* art. 12.

154. *Id.* art. 20, para. 1.

155. *Id.* art. 21.

156. See LCIA Rules, art. 1 (request for arbitration), art. 2 (response by the respondent, which may include counterclaims), art. 5.1 (party agreement on procedure "encouraged"), art. 6 (written submissions), art. 10 (hearing), arts. 11-12 (witnesses and experts), and art. 16 (award). Article 13.1(j) of the LCIA Rules, reflecting English practice, expressly authorizes the tribunal, unless the parties agree otherwise, to "order any party to produce to the Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession or power which the Tribunal determines to be relevant."

157. The Commercial Arbitration Rules of the AAA (effective January 1, 1988) provide for a notice of intention to arbitrate and authorize, but do not require, an answering statement (in the absence of an answer the claim will be assumed to be denied), which may include counterclaims although there is no explicit provision allowing counterclaims. AAA Rules, sec. 7. They

by the United Nations Commission on International Trade Law (UNCITRAL).<sup>158</sup>

Under ICC practice, which reflects international practice generally, the arbitral panel is composed of either a sole arbitrator or, in more complex cases, usually three arbitrators.<sup>159</sup> A sole arbitrator or the chairman of the panel of three, unless the parties themselves agree on the arbitrator or chairman,<sup>160</sup> is appointed by the ICC. Neither a sole arbitrator nor the chairman may be a national of the country of either party, unless the parties consent thereto.<sup>161</sup> The other two arbitrators in a three-person panel are appointed by the ICC on the nomination of the parties.<sup>162</sup>

Under the ICC Rules, all arbitrators, including those nominated by the parties, "must be and remain independent of the parties involved in the arbitration," and all nominees are required to disclose in writing "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence from the parties."<sup>163</sup> These rules also establish

---

authorize representation by counsel. *Id.* sec. 22. No specific provision is made that an award must state the reasons for the arbitral decision. The AAA has issued Supplementary Procedures for International Commercial Arbitration (effective February 1, 1986) applicable to international arbitration. These provide for an exchange of documents between the parties and a submission of documents to the arbitrators prior to the hearing (Sections 3 and 4) and contemplate a "written opinion" by the arbitrators "explaining the reasons for their award" with the explanation that this is often expected by parties in international arbitration. *Id.* sec. 7.

158. The so-called "UNCITRAL Rules" were adopted in 1976 by the United Nations Commission on International Trade Law. 31 U.N. GAOR Supp. (No. 17) at 21-22, U.N. Doc. A/31/17, (1976); Annex II, 1976 Y.B. OF THE U.N. COMM. ON INT'L TRADE LAW, U.N. Doc. A/Cn.9/Ser.A/1976. They were recommended for use in the settlement of international commercial disputes by the United Nations General Assembly. G.A. Res. 31/98, 31 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/CN.9/Ser.A/1977. The UNCITRAL Rules are considerably more detailed than the ICC and LCIA Rules. They may be combined with institutional administration of an arbitration by contractual designation of a body such as the ICC Court of Arbitration as an appointing authority. The UNCITRAL Rules contemplate written statements of claim and defense, including counterclaims (articles 18-19), further written submissions (article 22), oral hearings (article 25), interim and provisional remedies (article 26), the appointment of experts (article 27), and a written award, which is to state the reasons for the award, "unless the parties have agreed that no reasons are to be given" (article 32). 31 U.N. GAOR Supp. (No. 17) at U.N. Doc. A/CN.9/112 and Add.1.

159. ICC Rules, *supra* note 143, art. 2, paras. 2, 5. In the years 1984-88 between fifty-seven and sixty-four percent of ICC cases were submitted to three arbitrators. 115 CLUNET 1196, 1197 (1988).

160. ICC Rules, *supra* note 143, art. 2, paras. 3, 4. Paragraph 4 of Article 2 contemplates that the parties may provide for selection of the chairman of the arbitral tribunal by agreement between the party-nominated arbitrators. In practice, the ICC Secretariat will allow parties, directly or through their nominated arbitrators, to attempt to reach agreement on the chairman, even if their agreement to arbitrate contains no provision on the point.

161. *Id.* art. 2, para. 6. Article 3.3 of the LCIA Rules is substantially identical.

162. *Id.* art. 2, para. 4.

163. *Id.* art. 2, para. 7. Provisions of LCIA Rules, Article 3.3 are similar. See also, Int'l Bar Assn., *Ethics for International Arbitrators*, 26 I.L.M. 583 (1987); Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. INT'L ARB. 103 (1987). The international insistence on the independence of party-nominated arbitrators should be contrasted with the more lenient view stated in the leading New York case: "Our decision that [a party-appointed] arbitrator may not be disqualified solely because of a relationship to his nominator or to the subject matter of the controversy does not, however, mean that he may be deaf to the testimony

procedures for challenging the arbitrators, challenges which are to be decided by the Court of Arbitration.<sup>164</sup>

The procedures in an ICC arbitration were presented to the Supreme Court in *Mitsubishi* in an extensive amicus brief submitted by the ICC. The brief noted that, notwithstanding the parties' freedom to choose arbitrators, "almost all international arbitrators are persons of experience and learning drawn from the legal community."<sup>165</sup> The brief also called attention to several cases submitted to ICC arbitration that had involved complex statutory issues, including fundamental issues of the antitrust law of the European Economic Community.<sup>166</sup> On the basis of a record that included these uncontroverted demonstrations, the Supreme Court concluded, as noted above,<sup>167</sup> that there was no reason in principle to doubt the capacity of international commercial arbitration to deal adequately with complex issues of fact and law.

Further assurance that the process of arbitration offers no justification for raising doubts as to the effect to be given to awards can be found in some of the very respects in which arbitration differs from adjudication under typical U.S. court procedures.

Once an arbitration is commenced there is no way short of a settlement to deny a party his "full day in court." There is no motion to dismiss, and there are no procedures akin to summary judgment that permit a decision short of a full presentation of the case. ICC procedure requires that a party be given an opportunity to submit his case both in writing and with evidence adduced at a hearing.<sup>168</sup>

The normal composition of the arbitral tribunal and the absence of any right to trial by jury assures that complex controversies will not be submitted for crucial decisions to laymen having no relevant experience or expertise.

---

or blind to the evidence presented. Partisan he may be, but not dishonest." *Astoria Medical Group v. Health Insurance Plans*, 11 N.Y.2d 128, 137, 227 N.Y.S.2d 401, 407, 182 N.E.2d 85, 89 (1962).

164. ICC Rules, *supra* note 143, art. 2, pars. 8, 9. The current text of the ICC Rules, amended effective January 1, 1988, has tightened the procedures and time limits for challenges to arbitrators in an effort to minimize the bringing of challenges as a delaying tactic.

165. Brief for the International Chamber of Commerce as Amicus Curiae at 15-17 [hereinafter ICC Amicus Brief]. The ICC Secretariat has recently offered the estimate that currently between ninety and ninety-five percent of the sole arbitrators and chairmen appointed by the ICC have legal training, a practice stated to follow and reflect the arbitral nominations proposed by the parties. The Secretariat also advises that in appropriate cases the ICC has appointed, and will continue to appoint, arbitrators who are not lawyers. Private communication to the author, February 20, 1989.

166. ICC Amicus Brief, *supra* note 165, at 17-20.

167. *Mitsubishi*, *supra* notes 32-40 and accompanying text.

168. See *supra* notes 148-49 and accompanying text. A possibly dispositive threshold issue will be raised if the respondent challenges the existence of an agreement to arbitrate the dispute. If the ICC Court of Arbitration determines that no *prima facie* agreement to arbitrate exists, it will reject the case. ICC Rules, *supra* note 143, art. 7. If, on the other hand, the Court concludes that *prima facie* such an agreement does exist, the case will go forward but the jurisdictional issue may be pursued before the arbitrators. *Id.* art. 8, para. 3.

The requirement of a written award dealing with the merits of the case contrasts sharply with the often ill-defined process by which a jury reaches its verdict and the not infrequent brief memoranda by which judges dispose of non-jury cases. Additionally, the substantial minimum expense of almost any international commercial arbitration<sup>169</sup> tends to assure that frivolous claims are not pressed.

Time pressures on the parties and counsel are commonly less severe in arbitration than is the case in over-burdened civil courts. The page limitations on appellate briefs and the time constraints on court argument have no necessary counterpart in the presentation of a case to arbitrators, who do not normally have a lengthy docket of other cases demanding attention and disposition. For this reason, and because an international commercial arbitration, unless settled, will proceed through a full trial before decision, international arbitration usually exhibits none of the "quick and dirty" informality that is often suggested to be the hallmark of arbitration.<sup>170</sup>

Perhaps the principal point on which critics of arbitral procedure rest their criticism is the absence of full-scale U.S.-style pretrial discovery.<sup>171</sup> In

---

169. International arbitration is paid for by the parties resorting to it. Under the ICC Rules, the party initiating the arbitration must pay a non-refundable filing fee, currently \$2,000. After the response to the request for arbitration has been received, the Court of Arbitration, by reference to its published schedule of fees and costs, fixes a deposit to cover the estimated expenses of administration of the case and the fees of the arbitrators, and the file will not be transmitted to the arbitrators until the parties have paid the amount fixed, normally in equal shares. The published schedule fixes the expenses and a range of arbitrator fees on a graduated schedule of descending percentages of the total monetary value at issue, measured by the damages sought by the claim and on counterclaims, if any. The minimum expenses are set at \$2,000 and minimum fees per arbitrator at \$1,000 to \$10,000. For an arbitration with \$1 million at issue, the schedule fixes an administrative expense of \$14,500 and fees per arbitrator from \$7,450 to \$30,000. In practice, the initial deposit is normally based on arbitral fees midway between the minimum and maximum. Thus, in the \$1 million case, the deposit required would usually approximate \$70,000 if three arbitrators are to serve. ICC Rules, *supra* note 143, app. III, Schedule of Conciliation and Arbitration Costs; ICC Rules, art. 9. See Bond, *The 1986 Reform of ICC's Practice Relating to Costs and Payments*, 2 *ARB. INT'L* 358 (1986). Under the LCIA Rules, apart from modest minimum administrative charges, both the administrative expense and arbitral fees are a function of time spent applied against a scheduled range, falling generally, so far as the arbitrator(s) are concerned, between 300 and 1,250 pounds sterling per day of meetings or hearings, and between 60 and 250 pounds per hour for other time spent on the arbitration. LCIA Rules, Schedule of Costs. Although arbitrators in domestic AAA arbitration are not generally compensated, the Supplementary Procedures for International Commercial Arbitration acknowledge that "[o]rdinarily, arbitrators on international cases are compensated" (Section 8), and the AAA undertakes to make arrangements for these fees and for necessary advance deposits. *Id.*

170. Although the ICC Rules formally require awards to be rendered within six months of the signature of the Terms of Reference, they reserve to the Court, "in exceptional circumstances and pursuant to a reasoned request from the arbitrator, or if need be on its own initiative," the power to extend this time limit. ICC Rules, *supra* note 143, art. 18, paras. 1, 2. In practice, this is commonly done, and awards rendered within a time limit so extended are not unenforceable for that reason. See *Laminours, Etc. v. Southwire Co.*, 484 F. Supp. 1063, 1066 (N.D. Geo. 1980); *La Société Nationale pour la Recherche, la Production, le Transport, la Transformation et al Commercialisation des Hydrocarbures v. Shaheen Natural Resources Co., Inc.*, 585 F. Supp. 57, 65 (S.D.N.Y. 1983), *affirmed on opinion below*, 733 F.2d 260 (2d Cir. 1984).

171. This difference has often been noted in judicial commentary on arbitral procedure. See *Scherk v. Alberto-Culver Co.*, 417 U.S. at 532 (Douglas, J., dissenting); *Mitsubishi v. Motors*

the usual commercial dispute the parties are well aware of what is at issue and of the facts and legal issues that the case presents. The parties normally have no need of discovery to determine whether they have a case. Therefore, the absence of full-blown discovery is of lesser import.<sup>172</sup>

In the second place, it is not true that discovery is wholly unavailable. Under ICC Rules, the arbitrators have an affirmative duty to "proceed within as short a time as possible to establish the facts of the case by all appropriate means."<sup>173</sup> This contrasts with the essentially passive role of a U.S. trier of fact as a referee or score-keeper of such evidence as the parties or their counsel choose to present. While arbitrators often have no power to compel the production of documents, their power to draw negative inferences from a party's failure to produce documents under its control is normally sufficient to lead to a production of the papers.<sup>174</sup> Similarly, they may insist on hearing witnesses under the control of the parties, and it would be hazardous indeed for a party to decline such an invitation.

A transcript of the arbitral hearing will be provided in any case in which a party desires one, but will be, like everything else in an arbitration, at the expense of the party or parties. Where the trial of the case is at all complicated, the preparation of a transcript is commonplace and is often useful in the preparation of post-hearing briefs.

Detractors also point out that commercial arbitration has loose evidentiary rules. This shortcoming, if it is one, is equally characteristic of many bench trials in federal courts.

Contrary to impressions derived from domestic American arbitration, international arbitrators are obliged to decide cases in accordance with law. Under ICC Rules, an arbitrator is permitted to act as an *amiable compositeur* (a friendly compromiser), and thus to decide a case simply on the equities, only "if the parties are agreed to give him such powers."<sup>175</sup> Otherwise, the arbitrator shall apply the law designated by the parties, and "[i]n the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."<sup>176</sup> Since international arbitrators are obliged to render awards revealing the legal basis for their decision,<sup>177</sup> their obligation to apply the appropriate law is not meaningless, even if the award is not subject to judicial review on the merits.

---

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. at 648 n. 14 (Stevens, J., dissenting); McDonald v. City of West Branch, 466 U.S. at 291. For a recent general discussion of the subject, see Morgan, *Discovery in Arbitration*, 3 J. ARB. 9 (1986).

172. See Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. Y.B. INT'L LEGAL STUDIES 163, 170-74 (1985).

173. ICC Rules, *supra* note 143, art. 14, para. 1.

174. See Lowenfeld, *supra* note 172, at 171-72.

175. ICC Rules, *supra* note 143, art. 13, para. 4.

176. *Id.* art. 13, para. 3.

177. *Id.* art. 20, para. 1.

A few recent examples from the author's personal experience in international arbitration under ICC Rules may put a little flesh on these bones. In one case, involving U.S. and Libyan parties, the central issue was whether the claimant had satisfactorily performed its obligations or whether the work had been completed outside what the respondent insisted were contractual budget and time limits. The contract was governed by the Libyan Civil Code. Thus, the legal analysis (before a tribunal composed of a senior Swedish lawyer as chairman and two Egyptian lawyers, nominated by the parties) revolved around classic civil law concepts.<sup>178</sup> These issues were extensively briefed and each party presented fact witnesses, as well as expert testimony on Libyan law to supplement the pre-hearing papers. The written award of eighty-one pages reviewed these issues and their factual underpinnings in great detail. The tribunal also required production, over initial objection, of a pertinent document in the hands of one of the parties.

A second case involved a breach of contract claim between Italian and U.S. parties, and included both tort and contract counterclaims. The tribunal was composed of two senior U.S. lawyers resident in Paris nominated by the parties, and a retired British lord of appeal, as the chairman appointed by the ICC. The tribunal received extensive briefing on relevant points of the governing New Hampshire law. The award canvassed the factual disputes, reviewed the legal issues, and decided the case in accordance with carefully stated conclusions. In this proceeding, by agreement between the parties, a considerable number of documents were exchanged in pre-hearing discovery.

A third case involved complex issues of Italian law raised by a dispute under a patent license agreement and related questions of the effect to be given to an administrative decision by the Italian patent office. One of the party-nominated arbitrators was a leading authority on Italian patent law, and the other was an experienced Italian lawyer and professor of administrative law. The chairman named by the ICC was a French *avocat* with extensive experience in international arbitration. No panel of a federal court of appeals would have brought comparable expertise to bear. In this case, in contrast to the other two, the facts were undisputed, and after written submissions attaching the pertinent documents, the tribunal heard four hours of argument on the legal issues.

Perhaps the most telling evidence of the adequacy of the procedure in international arbitration and the circumspection with which arbitrators proceed in dealing with a case is that in the many decisions in federal courts in the nearly two decades since the adherence of the United States to the New York Convention, no international commercial award has yet been set aside or refused recognition for procedural failures, although the Convention provides a number of bases to advance such a challenge.<sup>179</sup>

---

178. The Libyan Civil Code was adapted from that of Egypt, which in turn was modeled after the French Napoleonic Code. *LAW AND JUDICIAL SYSTEMS OF NATIONS* 5, 8 (1968).

179. See *infra* notes 184-85 and accompanying text.

*B. The Legal Implications of the New York Convention on the Effect of International Awards*

The New York Convention is directly relevant to the question of the effect to be given in a U.S. court to a "foreign" arbitral award rendered in a commercial arbitration. By its accession to the Convention in 1970,<sup>180</sup> the United States became obliged to "recognize awards to which the Convention applies as binding" under the conditions laid down in the Convention.<sup>181</sup> It is, moreover, obliged to do so under procedures "not substantially more onerous" than those imposed on the recognition and enforcement of domestic arbitral awards.<sup>182</sup>

The Convention simplifies the burden of the party seeking recognition and enforcement of an award. The party need only supply a properly authenticated or certified copy of the arbitral award and the original agreement to arbitrate pursuant to which the award was rendered or a certified copy of it, plus, if either of these documents is not in the official language of the enforcing State, a certified translation into that language.<sup>183</sup> The Convention permits recognition and enforcement to be refused only in limited circumstances. First, recognition and enforcement can be refused if the party opposing it succeeds in establishing one or more of five grounds enumerated in Article V(1).<sup>184</sup> Additionally, recognition and enforcement can be refused if the court

---

180. The Convention entered into force for the United States on December 29, 1970, pursuant to Article XII(2) of the Convention, 90 days after the deposit of the American instrument of ratification. See 21 U.S.T. 2517, T.I.A.S. No. 6997.

181. New York Convention, *supra* note 17, art. III. The Convention applies to "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" and also to "awards not considered as domestic awards in the State where recognition and enforcement are sought." *Id.* Under this language enforcement was ordered of an award rendered in New York between a Norwegian shipowner and a Swiss corporation under charters for the transportation of chemicals between Europe and the United States. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983). The prevailing party was thus able to take advantage of the three-year statute of limitations on enforcement of Convention awards, 9 U.S.C. § 207 (1982), and avoid the application of the one-year period for enforcement under the Federal Arbitration Act, 9 U.S.C. § 9 (1982), which had expired.

182. New York Convention, *supra* note 16, art. III.

183. *Id.* art. IV. These formal requirements have been liberally interpreted to facilitate enforcement. See *Bergesen*, 710 F.2d at 934, holding that the provision of Article IV(1) of the Convention, requiring the party seeking recognition and enforcement of an award to supply "the duly authenticated original award or a duly certified copy thereof," was satisfied by the affidavit of the chairman of the arbitral tribunal certifying the award. The court rejected the contention that the petitioner was required to supply either the authenticated original award or a certified copy of the authenticated award.

184. Article V(1) of the New York Convention provides that recognition and enforcement "may be refused" (but need not be refused) upon proof that:

(a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

in which recognition or enforcement is sought finds (either on submission of a party or on its own motion) that the subject matter of the dispute submitted to arbitration is "not capable of settlement by arbitration" under the law of the enforcing jurisdiction or that recognition and enforcement of the award "would be contrary to [its] public policy."<sup>185</sup> None of the enumerated grounds for refusing recognition and enforcement, which have been viewed as exclusive,<sup>186</sup> contemplates judicial review of the merits of the award either as to fact or law.

In connection with American adherence to the Convention, Title 9 of the United States Code was amended by the addition of Chapter 2.<sup>187</sup> This implementing statute broadly defines the agreements to which the Convention applies,<sup>188</sup> establishes federal question jurisdiction for actions or proceedings under the Convention,<sup>189</sup> provides for liberal venue,<sup>190</sup> permits removal from state to federal court at any time prior to trial of any action or proceeding in a state court that "relates to an arbitration agreement or award falling under the Convention,"<sup>191</sup> and authorizes the district court to direct arbitration at

---

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority or the country in which, or under the law of which, that the award was made.

185. New York Convention, *supra* note 17, art. V(2).

186. *Imperial Ethiopian Gov't. v. Baruch-Foster Corp.*, 535 F.2d 334, 335-36 (5th Cir. 1976); *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (1974); *Iptrade Int'l S.A. v. Fed. Republic of Nigeria*, 465 F. Supp. 824, 826 (D.C. 1978); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 951-52 (S.D. Ohio 1981), *reh'g denied*, 530 F. Supp. 542 (1982). 9 U.S.C. § 207 provides that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

187. Pub. L. No. 91-368, 84 Stat. 692, (1970) (adding Chapter 2, sections 201-208, to Title 9). Section 201 provides that the Convention "shall be enforced in United States courts in accordance with this chapter."

188. 9 U.S.C. § 202 (1982). Convention coverage is limited, consistent with the declaration made by the United States in adhering to it, to agreements arising out of a "legal relation . . . which is considered as commercial" under the national law of the United States, but it applies even to agreements and awards entirely between citizens of the United States if "the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." This, too, has been liberally applied. *See Fuller Co. v. Compagnie des Bauxites de Guinée*, 421 F. Supp. 938, 942-44 (W.D. Pa. 1976).

189. 9 U.S.C. § 203 (1982). This contrasts with proceedings under the Federal Arbitration Act, now Chapter 1 of Title 9, which has been interpreted to require independent federal subject matter jurisdiction. *See, e.g., General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 969 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

190. 9 U.S.C. § 204 (1982).

191. *Id.* § 205.

any place provided for in the arbitration agreement, whether in the United States or abroad.<sup>192</sup> Pursuant to the mandate of Section 207 of Title 9, the district court, subject to a three-year statute of limitation,<sup>193</sup> “shall confirm the award” unless it finds a ground “specified in said Convention” for refusing recognition or enforcement.<sup>194</sup> The federal courts have uniformly taken the position that a liberal view of enforcement is the proper perspective and, in particular, have given the “public policy” exception of Article V(2) a narrow reading.<sup>195</sup> Few, indeed, are the cases in which enforcement of a Convention award has been refused on public policy grounds.<sup>196</sup>

No case has yet arisen in the United States, and none appears to have been decided abroad, in which *res judicata* or collateral estoppel effect has been claimed for an award in reliance upon the Convention.<sup>197</sup> The logic of the Convention, however, would seem to be clear. At least where the issue is

---

192. *Id.* § 206. If the agreement does not specify the place of arbitration, the Court may only direct arbitration within the district where it sits, pursuant to 9 U.S.C. § 4.

193. This statute of limitations contrasts with the one year provision under the Federal Arbitration Act, 9 U.S.C. § 9. See *Bergesen*, 710 F.2d 928 (1983).

194. 9 U.S.C. § 207 (1982).

195. The leading case is *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie de Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), which held that the public policy defense applied “only where enforcement would violate the forum state’s most basic notions of morality and justice.” *Id.* at 974. The court in that case declined to refuse enforcement of an award where the arbitrators had given only limited recognition to a force majeure defense by an American contractor on an Egyptian construction project, notwithstanding the termination of diplomatic relations between Egypt and the United States and the withdrawal of U. S. agency funding for the project following the Six-Days War. The Court stated that “public policy” within the meaning of the Convention was not to be equated with “national political policy” and that to accept the contractor’s argument “would mean converting a defense intended to be of narrow scope into a major loophole in the Convention’s mechanism for enforcement.” *Id.*

196. *Laminoirs, Etc. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Geo. 1980) (refusing enforcement of that portion of an ICC award rendered in Paris which applied an automatic increase in interest on the award if it were not paid within two months, provided for by French law, on the ground that it was an unenforceable penalty under Georgia usury law); *Sea Dragon, Inc. v. Gebr. van Weelde Scheepvaart-Kantoor B.V.*, 574 F.Supp. 367 (S.D.N.Y. 1983) (denying enforcement of an award that directed payment of an amount sequestered by order of a Dutch court).

197. A summary of court decisions in Convention cases through 1980 discloses no such cases. See A. VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981). The subsequent summaries of court decisions interpreting or applying the Convention, annually published under the auspices of the International Council for Commercial Arbitration, likewise disclose no such cases. 7 Y.B. COMMERCIAL ARBITRATION 287-392 (1982); 8 Y.B. COMMERCIAL ARBITRATION 331-426 (1983); 9 Y.B. COMMERCIAL ARBITRATION 323-494 (1984); 10 Y.B. COMMERCIAL ARBITRATION 327-547 (1985); 11 Y.B. COMMERCIAL ARBITRATION 393-584 (1986); and 12 Y.B. COMMERCIAL ARBITRATION 405-552 (1987). But see, *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F. Supp. 499 (E.D. Mich. 1974), *aff’d*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975), in which the District Court gave a limited collateral estoppel effect to an arbitral award rendered in Zurich in 1973 on default, but declined to give the award preclusive effect on “antitrust issues” on the ground that the plaintiff’s antitrust claim was within the exclusive jurisdiction of the court. The District Court stated that it was immaterial for the application of collateral estoppel that the prior proceeding was an arbitration, rather than a judicial proceeding, or that it was before a foreign rather than a domestic arbitral tribunal. 375 F. Supp. at 511. The District Court also held that it was immaterial that the arbitral award had not been confirmed or appealed. *Id.* at 517. The Court of Appeals did not pass on the correctness of the approach to preclusion taken

the conclusive effect of a Convention award as between the parties to the arbitration, a district court could not properly refuse to give the award "claim preclusive" effect unless a ground to refuse "recognition," as established by the Convention, were shown.<sup>198</sup> Of particular pertinence to the present subject, it would be plainly inconsistent with the Convention to oppose recognition of a Convention award on grounds of the generalized distrust of arbitral procedure expressed in *McDonald*. Any such approach would be wholly at odds with U.S. adherence to the Convention and with the congressional action to implement enforcement of the Convention in the federal courts.<sup>199</sup>

The Convention mandates that as between the parties to the arbitration, and subject to the recognized defenses, the award must be held conclusive as to the claim decided. Beyond that, however, the Convention requirement that awards be "recognized" does not define the scope to be given to the award.<sup>200</sup> The "legislative history" of the Convention contains no discussion of the collateral estoppel effect, if any, appropriate for Convention awards.<sup>201</sup> On the other hand, the affirmative command that foreign arbitral awards be recognized would plainly appear to preclude a skeptical view of the arbitral process as a foundation for considering the application of domestic notions of preclusion to awards covered by the Convention. The logic of American adherence to the Convention requires no less.

## V.

### DEFINING THE GUIDING PRINCIPLES

If the teaching of *McDonald* were applicable to arbitral awards generally, a commentary on their preclusive effect would be as brief as Horrebrow's celebrated chapter on snakes in Iceland. Despite its broadly stated rationale,

---

by the District Court, on the ground that the latter's "narrow application of collateral estoppel principles" did not affect the outcome. Neither court referred to the New York Convention.

198. This is also the view expressed by Dr. Van den Berg. See A. VAN DEN BERG, *supra* note 197. Compare the observation that "[t]o 'recognize' a foreign judgment means to respect the foreign court's decision as *res judicata*." Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. LAW 1, 5 (1988).

199. Under general principles of Federal Supremacy, a state court should likewise be held bound to give a Convention award the effect mandated by the treaty. The dominance of federal policy in respect to arbitration, established by *Southland Corp. v. Keating*, 465 U.S. 1 (1984), would seem to make arbitration subject to the Convention an *a fortiori* case for displacement of state law.

200. Dr. Van den Berg states that in a subsequent action between the same parties the award should be given a claim preclusive effect: "the same conditions as for the enforcement of an award laid down in Articles IV-VI are applicable." A. VAN DEN BERG, *supra*, note 197, at 244. In his view, it is less clear whether arbitral findings of fact or conclusions of law will be recognized as binding in a subsequent action on a related subject between the parties to an earlier arbitration, suggesting by reference to differences between the French and German law of preclusion that this is a matter to be determined under the law of the jurisdiction where preclusion is claimed, rather than a question to be viewed as governed by the New York Convention itself. *Id.*

201. G.W. HAIGHT, SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE, MAY/JUNE 1958 (1958), contains no reference to the subject.

however, *McDonald* has not been accorded that significance.<sup>202</sup> As discussed above, to apply the *McDonald* approach to an award issuing from international commercial arbitration would be to disavow treaty obligations undertaken by the United States in the New York Convention, as well as to repudiate long-established jurisprudence. Nonetheless, the reliance placed on this approach in *Byrd* suggests that *McDonald* has pernicious growth possibilities in arbitration outside the labor field.

To date there is substantial unanimity that an arbitral award, otherwise entitled to enforcement, must normally be given at least a minimum *res judicata* or claim preclusive effect.<sup>203</sup> As one authority has put it, “[i]f any party dissatisfied with the award were left free to pursue a judicial remedy on the same claim or defense, arbitration would be substantially worthless.”<sup>204</sup> Professor Shell, whose views are considered at more length below,<sup>205</sup> would add a proviso that awards are to be given such an effect, unless “the limited nature of the agreement or express language suggests otherwise.”<sup>206</sup> Professor Shell agrees, however, that normally a claim preclusive effect should be given to the award and that the party opposing preclusion, not the party relying on the award, should bear the burden of proof on the question of preclusion.<sup>207</sup>

Given that a minimum claim preclusive effect must usually be accorded an award, the main area of controversy has concerned the application of collateral estoppel or issue preclusion to an arbitral award.<sup>208</sup> The major problems perceived in that effort reflect in part the relatively recent expansion of the American law of preclusion, coupled with a concern, now essentially outdated, for the effect, in a subsequent litigation within the exclusive jurisdiction of the federal courts, of findings in a prior arbitration.<sup>209</sup> As one commentator put the matter, American law of preclusion has moved from “a cluster of axiomatic rules of law specific in form, absolute in force, and

---

202. Professor Shell, for example, basically excludes *McDonald* and its predecessors from his analysis as caselaw that is concerned with labor arbitration, which he notes “serves different purposes” from commercial arbitration and is outside the coverage of the Federal Arbitration Act. See Shell, *supra* note 93, at 623 n. 1.

203. See RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1981); 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4475, at 770-72 (1981).

204. 18 WRIGHT & MILLER, *supra* note 203, at 770-71 (noting an exception for special statutory schemes illustrated by *Gardner-Denver*, 415 U.S. 36 (1974), which held that grievance arbitration does not preclude an employment discrimination claim under Title VII).

205. See *infra* notes 209-237 and 246-52 and accompanying text.

206. Shell, *supra* note 93, at 663.

207. *Id.* at 665.

208. In *Montana v. United States*, 440 U.S. 147, 164 (1979), the Court defined collateral estoppel as follows: “Once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive on subsequent suits based on a different cause of action involving a party to the prior litigation.” See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1981).

209. See *supra* note 86.

mandatory in application”<sup>210</sup> to a “broadly equitable discretion as the predominant mode of decision.”<sup>211</sup> The principal development in this revolutionary transition, so far as concerns collateral estoppel, has been the repudiation of the requirement of mutuality, signaled by the Supreme Court decisions in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,<sup>212</sup> sanctioning so-called “defensive” non-mutual collateral estoppel, and *Parklane Hosiery Co. v. Shore*,<sup>213</sup> sustaining non-mutual offensive collateral estoppel.

In *Parklane*, the Court was at some pains to delineate criteria to guide the discretion of federal courts in their application of the enlarged scope of collateral estoppel. These criteria require consideration of the parties’ incentives to litigate in the first case, the equivalence or difference in the procedural advantages offered by the two litigations, and the risks of inconsistent determinations.<sup>214</sup> In introducing a necessary reliance on a broadly discretionary case-by-case analysis, in substitution for black letter rules of law, the *Parklane* decision reflects a trend observable in many other areas of law.<sup>215</sup>

Application of the *Parklane* doctrine thus creates inevitable uncertainties even where the two litigations are domestic court adjudications. To these uncertainties must be added the substantially increased complexity introduced when the prior determination is rendered by a foreign court.<sup>216</sup> To the extent that the American effect of the judgment is viewed as limited by the effect that the rendering court would have given it, the parties to the case and the U.S. court confront the difficult task of determining that foreign scope.<sup>217</sup>

---

210. <sup>2</sup> Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L. J. 615, 616 (1980).

211. *Id.* at 618.

212. *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313 (1971).

213. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

214. *Id.* at 329-32. The Court further stated that trial courts are granted “broad discretion to determine when [collateral estoppel] should be applied.” *Id.* at 331.

215. This approach is illustrated by the expansion of the rule of reason at the expense of *per se* rules in antitrust analysis. See *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). See also Easterbrook, *Vertical Restraints and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153-57 (1984). Professor Holland has observed that “[r]emitting various questions of procedure formerly controlled by law to a regime of discretion, always presumed to be enlightened and principled, has proved a seductively attractive recourse in recent years.” Holland, *supra* note 210, at 639.

216. For a general discussion of the principles governing the effect that American courts should give to foreign court judgments, see Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962); von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968); and Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1 (1988). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 8, subch. A (1986).

217. Smit, *supra* note 216, at 63. The scope of issue preclusion varies widely in foreign legal systems, although generally it is narrower than under modern American law. See Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law*, 70 IOWA L. REV. 53, 62-70 (1984) (reviewing the law of England, France, West Germany, Switzerland, Japan, Argentina and Mexico).

Although it is sometimes said that a U.S. court will give no more effect to a foreign judgment than the rendering forum would have given it, a U.S. court appears to be free to apply its own rules of preclusion.<sup>218</sup>

The problems become still more severe where the foreign adjudication for which preclusive effect is claimed is an arbitral award. A foreign court judgment at least arises out of a single identifiable legal system, whereas it is not at all obvious that the law of the often fortuitous place of an arbitration should play any particular role in defining the preclusive effect of the award.<sup>219</sup> Perhaps because the additional foreign elements add simply too much complexity, or perhaps because they are viewed as of only marginal importance to central issues, the recent efforts to define principles for determining the preclusive effects of arbitral awards generally ignore the foreign aspect.

### A. *The "Full and Fair Opportunity" Approach*

The usual approach taken in considering the application of preclusion doctrine to arbitral awards has been to consider whether the arbitral process is sufficiently likely to afford the party sought to be precluded the required "full and fair opportunity" to present its case.<sup>220</sup> The conclusion that emerges from analysis thus largely depends on the significance attached to the respects in which arbitral proceedings, invariably described in their domestic dress, differ from what would have gone on in a court adjudication.

If the analyst places emphasis on the looser arbitral approach to rules of evidence, the swearing of witnesses, the availability of a transcript, the likelihood of an unexplained decision, and in particular the unavailability of the pretrial discovery available under the Federal Rules or state court counterparts, the conclusion all but inevitably follows that preclusive effect should be

---

218. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481, comment c, reporter's note; Smit, *supra* note 216, at 63 n. 124.

219. The French court in 1980 dismissed an effort to obtain review of an award in an ICC arbitration in Paris of a dispute between Swedish and Libyan parties under a contract neither made nor performed in France, because the parties had not subjected the arbitration to French procedural law. The choice of Paris as the place of arbitration was held not to constitute such a choice. *General Nat'l Maritime Trans. Co. v. Gotaverken Arendal A.B.*, Court of Appeal, Paris, Rec. Dalloz Sirey 368-69 (1980). This spawned a considerable controversy over "denationalized" arbitration and its consequences. See Paulsson, *Arbitration Unbound: Award Detached from the Law of the Country of its Origin*, 30 INT'L & COMP. L.Q. 358 (1981); Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983). Amendments to the French New Code of Civil Procedure in 1981 introduced procedures for limited review of an award in such a case (Articles 1501-07), but the Code continues to allow parties to an international arbitration in France to adopt French procedural law or not, as they choose (Articles 1494-95). J-L DEVOLVE, *supra* note 14.

220. This is an explicit requirement for application of collateral estoppel. See, e.g., *Montana*, 440 U.S. at 164; *Parklane*, 439 U.S. at 330-32; RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1981).

refused.<sup>221</sup> This inquiry may seem excessively scrupulous, viewed in light of *Parklane* itself, which sustained the offensive use of collateral estoppel in a subsequent action triable by jury as to findings made in a prior non-jury case.<sup>222</sup>

Where, however, the analyst takes as a starting point the proposition that the parties electing to arbitrate must be held to have done so in full recognition of the less formal procedures of arbitration, the collateral estoppel effect to be given to arbitral findings will be left for resolution to case-by-case analysis hardly distinguishable from that required in any other case, with no presumption that arbitral findings are necessarily entitled to less or no weight.<sup>223</sup>

These analyses proceed from the judicial model, which is the approach consecrated by the decisions, and attempt in substance to distill generalizations appropriate to arbitration from consideration of the criteria pertinent under the *Parklane* doctrine. Professor Shell, however, rejects the judicial

---

221. See Carlisle, *Getting a Full Bite at the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law*, 55 FORD. L. REV. 63 (1986) (criticizing New York decisions and suggesting that the burden of establishing whether the requisite "full and fair opportunity" has been accorded should rest with the proponent of preclusion and taking the position that, because the lack of full discovery and application of rules of evidence are key elements in any such showing, preclusion should rarely be accorded).

222. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 652 n.19 ("[T]he presence or absence of a jury as a fact-finder is basically neutral."). Compare *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), which held that the difference between arbitration and a state court jury trial was outcome-determinative for purposes of *Erie* analysis. The jury trial issue in *Parklane* provoked a long dissent by Justice Rehnquist. 439 U.S. at 655.

223. See Mobilia, *Offensive Use of Collateral Estoppel Arising Out of Non-Judicial Proceedings*, 50 ALBANY L. REV. 305 (1986). Comment c to Section 84 of the Restatement (Second) of Judgments notes the circumstances that would justify denying issue preclusive effect to an arbitral award, but adds:

... in the absence of such circumstances, there is good reason to treat the determination of the issues in an arbitration proceeding as conclusive in a subsequent proceeding, just as a determination of a court would be so treated. When arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has. Economies of time and effort are thereby achieved for the prevailing party and for the tribunal in which the issue subsequently arises.

The weight of comment, however, seems clearly opposed to more than a reluctant acceptance of collateral estoppel based on arbitral awards. See 18 WRIGHT & MILLER, *supra* note 203, § 4475. Von Mehren and Trautman suggest that "the more intricate and far-reaching preclusion doctrines should probably be avoided in international recognition practice," *supra* note 216, at 1680, a conclusion expressed as to foreign court judgments, but the authors propose that the same principles should apply "analogously" to non-judicial determinations. *Id.* at 1601 n. 2. Professor Vestal, while of the view that according an arbitral award claim preclusive effect would be consistent with the authorities on the point, stated that "only in a very limited situation is preclusiveness to be accorded to an issue decided by an arbitrator's award." Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857, 880-81 (1966).

model altogether as an appropriate starting point, arguing that the parallelism drawn between arbitration and litigation is "seriously flawed."<sup>224</sup> He proposes in its place a rationale based on contractual intent.<sup>225</sup>

Professor Shell offers three reasons for rejecting the judicial model. He first asserts that the societal and institutional interests that attach to litigation by publicly maintained courts do not attach to awards in private arbitration.<sup>226</sup> Court decisions, unlike arbitral awards, are publicly recorded and frequently result in declarations of rules for deciding future cases, a matter of great public interest.<sup>227</sup> With all respect, this view seems to be more the statement of a difference than an explanation as to why the results in an arbitration, even if private, should be less binding on the parties to the award than a court judgment would have been.

The second reason suggested is the "categorically different" mode of fact-finding in arbitration.<sup>228</sup> In major respects, this is the "full and fair opportunity" issue in slightly different dress. An arbitrator, he notes, can render a compromise decision and can base it on irrelevant evidence and hearsay, whereas a court judgment in such circumstances would be reversible.<sup>229</sup> These observations have at best diminished force in international commercial arbitration.<sup>230</sup> International arbitrators must render reasoned awards in conformity to law and have no right to dispense the personal justice of an *amiable compositeur* unless explicitly granted the power to do so.<sup>231</sup> There seems to be no sound basis and certainly no consistent one to suppose that arbitrators will attach weight to evidence that is not reliable or probative on the issues before them. These observations about the procedural risks of arbitration seem little more than a complaint that arbitral errors of fact and law are not reviewable on the merits by a judge. Moreover, if the defects of the arbitral process are as serious as Professor Shell suggests, it seems almost perverse to accord an award the claim preclusive effect that he concedes is generally appropriate, a consequence which necessarily operates in every case, and to give effect to the reservations about arbitration procedure only in the relatively rare case in which a collateral estoppel effect is claimed for an award.<sup>232</sup>

---

224. Shell, *supra* note 93, at 658.

225. *Id.* at 660-75. See also 18 WRIGHT & MILLER, *supra* note 203, § 4775 (proposing the same approach).

226. Shell, *supra* note 93, at 658.

227. *Id.* See also Carbonneau, *Rendering Arbitral Awards With Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579 (1985).

228. Shell, *supra* note 93, at 659.

229. *Id.*

230. See *supra* notes 175-76 and accompanying text.

231. See *supra* note 175 and accompanying text.

232. Compare the comment of Judge Feinberg in *Fallick v. Kehr*, 369 F.2d 899 (2d Cir. 1966), holding that an arbitrator should be permitted to decide the effect of a discharge in bankruptcy on the claim at issue. "Logically, if the possibility that an arbitrator may make an unreviewable error alone justifies enjoining one arbitration, it requires enjoining all." *Id.* at 903.

The third reason given for rejecting the judicial model is that arbitral awards are frequently unexplained and difficult to interpret.<sup>233</sup> Professor Shell adds that “[i]ndeed, arbitration organizations discourage written opinions for fear that such explanations make awards more vulnerable to attack by the losing party.”<sup>234</sup> He cites as evidence a guide to commercial arbitrators issued by the AAA.<sup>235</sup> In respect of international arbitration, however, the AAA has issued supplemental procedures, which note that in international cases the parties “often expect arbitrators to provide a written opinion explaining the reasons for their award,” and accordingly provide for such an opinion in international cases.<sup>236</sup> The AAA international procedures conform to international practice, and indeed to the domestic arbitration laws of a number of foreign countries which require reasoned awards as a prerequisite to enforcement.<sup>237</sup> It is not obvious why the possible failure of arbitrators to make findings or otherwise explain themselves should be generalized into the basis for a rule denying preclusion even to awards with detailed findings and elaborate reasoning, which is the norm in international cases.

Of course, where the arbitrators make no subsidiary findings and state no reasons for their decision, it will be difficult, although not always impossible, to apply collateral estoppel. Two decisions in *Dalow Industries, Inc. v. Jordache Enterprises, Inc.*<sup>238</sup> and the decision in *Greenblatt v. Drexel, Burnham, Lambert, Inc.*<sup>239</sup> are illustrative.

In *Jordache*, Dalow, the licensee of the Jordache marks for the manufacture and sale of gold and silver jewelry, sued Jordache alleging various contract, tort, and trademark claims. Dalow also sued Rolo, the holder of a second license to manufacture costume jewelry under the same marks, and Rolo's agent, alleging tortious interference with Dalow's license agreement. Jordache successfully moved for a stay of the action against it by virtue of an arbitration clause in the license agreement, and in the arbitration, counterclaimed for unpaid royalties. After an extensive hearing, the arbitrators

---

233. Shell, *supra* note 93, at 659-60.

234. *Id.*

235. AMERICAN ARBITRATION ASSOCIATION, A GUIDE FOR COMMERCIAL ARBITRATORS (undated).

236. AAA Supplementary Procedures, *supra* note 157, sec. 7.

237. Domestic French arbitration law, for example, requires that the award “set out succinctly the respective claims of the parties and the grounds they put forward” and that “reasons must be given for the decision.” New Code of Civil Procedure, art. 1471, translated in J-L. DELVOLVÉ, *supra* note 14. Article VII of the European Convention on International Commercial Arbitration, April 12, 1961, 484 U.N.T.S. 364, T.I.A.S. No. 7041, provides that:

the parties shall be presumed to have agreed that reasons shall be given for the award unless they (a) either expressly declare that reasons shall not be given; or (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

238. *Dalow Indus., Inc. v. Jordache Enter., Inc.*, 631 F. Supp. 774 (S.D.N.Y. 1985); 631 F. Supp. 779 (S.D.N.Y. 1986).

239. *Greenblatt v. Drexel, Burnham, Lambert, Inc.*, 763 F.2d 1352 (11th Cir. 1985).

awarded Jordache a sum for unpaid royalties and expressly denied "all other claims"<sup>240</sup> but without explanation or findings. The award was confirmed by the District Court.

Dalow then amended its complaint against Jordache, which moved to dismiss on *res judicata* grounds. The District Court granted the motion, holding that the operative facts, which were the same in the arbitration and the court suit, not the legal theory, defined the claim.<sup>241</sup> Rolo and his agent then moved to dismiss the claim against them as barred by collateral estoppel. Their motion was denied.<sup>242</sup> *Res judicata* was held inapplicable because they were neither parties to the arbitration nor in privity with Jordache as to the issues raised in that arbitration. Collateral estoppel was likewise unavailable because the arbitrators' failure to make findings left the court unable to determine that the issues claimed to be precluded had been necessarily raised and decided in the arbitration or that they were identical with those now presented.<sup>243</sup>

*Greenblatt*, on the other hand, illustrates the application of collateral estoppel notwithstanding the absence of an explanation of an arbitral award. In that case, the Court of Appeals, after first noting that "[t]he application of collateral estoppel is committed to the sound discretion of the district court,"<sup>244</sup> affirmed a dismissal of the plaintiff's RICO claim on the ground that a prior arbitral award, although it stated no pertinent findings, necessarily implied conclusions adverse to the plaintiff with respect to each of the circumstances claimed to constitute the requisite predicate acts.

It is not at all clear that the decisions in these cases would have been materially assisted by an effort to determine what the parties might rationally have agreed should be the preclusive effects of the arbitral award. Dealing with the awards as they would have with judgments,<sup>245</sup> the courts in both cases appear to have handled the preclusion issues in a satisfactory way.

---

240. See *Jordache*, 631 F. Supp. at 777.

241. *Jordache*, 631 F. Supp. at 778-79.

242. *Id.* at 779.

243. *Id.* at 781-82.

244. 763 F.2d at 1360.

245. The court in *Jordache* stated the proposition explicitly. "We of course treat the arbitration award as if it were a judicial decision for purposes of applying the preclusion doctrines." 631 F. Supp. at 778.

### B. The Contractual Model

Professor Shell has proposed a contractual model that proceeds from the unarguable premise that arbitration itself is a consensual process. If the parties by their contract impose explicit limits on the effect to be given to the award, he suggests that courts should respect them.<sup>246</sup>

A more limited concession to party autonomy seems preferable. A contract that invokes arbitration under ICC auspices, for example, calls into play the rule stating that "[t]he arbitral award shall be final."<sup>247</sup> No case is known in which parties contracted to arbitrate under ICC Rules but agreed that compliance with the award would be optional and would not preclude court litigation of the dispute. Arbitration under such a clause could not be compelled,<sup>248</sup> and it is doubtful that the ICC would accept its administration.<sup>249</sup>

---

246. Shell, *supra* note 93, at 662 ("The court should not, solely for its own convenience, accord an award more preclusive effects than the parties intended.").

Professor Shell distinguishes the public interest in judicial finality, to achieve which public resources have been committed. "Parties in court proceedings, therefore, have no power to contractually limit the preclusive effects of an adjudicated, final judgment without obtaining a judicial order vacating that judgment." *Id.* at 661.

This invites two qualifying comments. First, "res judicata" and "estoppel," like "arbitration and award," are affirmative defenses that are waived if not pleaded and proved. F.R.C.P. 8(c). The statute of limitations is likewise an affirmative defense, and agreements to waive it, at least if they are made after the claim accrues and for a specified duration, are generally enforceable. *United States v. Curtiss Aeroplane Co.*, 147 F.2d 1946 (applying New York law); *United Fruit Co. v. J. A. Folger & Co.*, 270 F.2d 666 (5th Cir. 1959); Note, *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1222-24 (1950). Yet the defense of the statute of limitations, like that of *res judicata*, is grounded in public policy considerations broader than the concerns of the parties: in the interest in repose and in avoiding the trial of stale issues as to which reliable evidence may no longer be available. See Note, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1014-18 (1980). If the statute of limitations may be waived, it is not obvious that a wholly different conclusion should apply to an agreement between the parties limiting the preclusive effects of a judicial determination. In any event, the parties have it in their power, by refraining from the assertion of available defenses, to require a trial that would otherwise be barred.

Second, issue preclusion, expanded by the elimination of the requirement of mutuality, invites, indeed requires, the court to consider a number of factors affecting the weight, if any, to be attached in the subsequent suit to the prior judicial determination. Among these is the question whether the party sought to be precluded was denied an opportunity or lacked the incentive to obtain a full and fair adjudication of the issue "as a result of the adversary's conduct." RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1981). It is not obvious that an agreement between parties limiting the preclusive effect of the prior determination would or should be irrelevant to this analysis.

247. ICC Rules, *supra* note 143, art. 24, para. 1.

248. The Federal Arbitration Act makes enforceable a written agreement "to settle by arbitration a controversy thereafter arising." 9 U.S.C. § 2 (1982). An agreement to arbitrate under a contractual provision allowing either party to freely ignore the result is not an agreement to "settle" anything.

249. In addition to the explicit provision of Article 24 quoted in the text, other ICC Rules reflect the concept of arbitration as a technique to "settle" disputes. See, e.g., ICC Rules, *supra* note 143, art. 2, para. 1 (the Court of Arbitration "does not itself settle disputes" but acts as an appointing authority); *id.* art. 2, paras. 2, 3 (disputes may be "settled" by a sole arbitrator or a panel of three arbitrators); *id.* art. 8, para. 1 (an agreement to arbitration by the ICC constitutes *ipso facto* a submission to the ICC Rules, including Article 24, paragraph 1); *id.* art. 24, para. 2 (by submitting to ICC arbitration "the parties shall be deemed to have undertaken to carry out

Arbitration is not mediation or conciliation but a process for the decision of disputes.<sup>250</sup> If one is to call the process "arbitration" at all, the agreement to submit to it must import a finality to the award, subject only to such grounds for relief from the award as law may provide.<sup>251</sup>

A major objection to the contractual model is that it depends upon an intent almost never—one is tempted to say simply, "never"—expressed. No case is known where the parties sought by their contract to define the precise preclusive effect of the award. Even if a doctrine were to be announced today making such an expression of intent the determinant of future decision, it would leave untouched the thousands of contracts providing for arbitration that are now in existence but contain no such provision.

In recognition of these difficulties, Professor Shell proposes that in the absence of explicit stipulations, courts should treat the preclusion question as an omitted term in the parties' contract and look at contextual evidence to determine the preclusive effects of an award. "[T]he court must ask itself what rational parties would have agreed to had the matter of preclusion been explicitly negotiated between them."<sup>252</sup>

This formulation would impose a nearly unbearable burden of speculation on the court in the context of arbitration under an international contract. The arbitration is often governed by law other than that of the United States and the parties are often unfamiliar with American notions of preclusion. In addition, the court would encounter all the difficulties attendant upon any later construction of imputed intent. An honest effort to determine what the

---

the resulting award without delay"); *id.* art. 26 (the Court of Arbitration and the arbitrators "shall make every effort to make sure that the award is enforceable at law").

250. It has been suggested that two of the "essential aspects of arbitration" are that "it is a method not of compromising disputes but of deciding them" and that "before the award is known it is agreed to be 'final and binding'." Menschikoff, *The Significance of Arbitration — A Preliminary Inquiry*, 17 *LAW & CONTEMP. PROBS.* 698, 699 (1952).

251. This comment excludes, of course, various state-initiated techniques for "alternative dispute resolution" of small claims initially asserted in judicial proceedings that reserve to a party dissatisfied with the result of arbitration thereunder a right to a trial *de novo* in court. See, for example, Rosenblatt, *Alternative Dispute Resolution: A New York Primer*, N.Y. St. B.A. J. 10 (Feb. 1989), discussing the New York program. Enabling authority for the program appears in N.Y. Civ. Prac. L. & Rules, Rule 3405, and the rules themselves appear in 22 N.Y.C.R.R. 28.1.

252. Shell, *supra* note 93, at 662-63. Professor Shell concedes that if the intention of the parties is to be judged from the answer they would give to the question of the preclusive effect intended, how the question is framed may well be decisive.

Would rational parties, bargaining before arbitrators have rendered any award, agree to be bound as to specific factual issues, the resolution of which could only be inferred from an unexplained arbitral decision that could be based, in whole or in part, on compromise, hearsay and irrelevant evidence? Framing the question in this way, of course, predetermines the answer. Parties uncertain that they will prevail in arbitration would probably hesitate to insist that an award have issue preclusive effect. *Id.* at 667.

The premises postulated have little in common with international arbitral procedure. See *supra* notes 175-77 and accompanying text.

parties themselves would be likely to have agreed to would require full presentation of an aggregate of business and psychological evidence almost certain to be unobtainable. The court would necessarily be compelled to impose its own notions, framed in terms of an imputed intent, but almost certainly not supported by sufficient evidence to infer an actual intent. Application of the *Parklane* rules, difficult as they may be to apply in any particular case, seems almost child's play by comparison. As illustrated in the cases, the *Parklane* rules suggest an adequate protection to parties whose choice of arbitration is now broadly sanctioned.

Committed as we are to the speculative scope of collateral estoppel under modern doctrine, it seems preferable to leave to analysis, under the terms of that jurisprudence, the scope of the effect of an international arbitral award, beyond giving it the claim preclusive effect routinely accorded to it by traditional case law and the minimum now required by treaty. The procedures of international commercial arbitration offer sufficient *prima facie* assurance of an acceptable decisional process to render unnecessary the construction of a separate calculus for determining the preclusive effects of an award.

#### CONCLUSION

Parties resorting to arbitration see it as a useful process. In the context of international commerce, it is often more than merely useful; unless the parties are prepared to subject their disputes to resolution by national courts, it is indispensable. In the purely domestic context, where the parties to a contract presumably have little to fear from local prejudice, the choice of arbitration may well reflect a preference for "soft law," or the compromise decisions to which commentators point, rather than the law and procedure dispensed by formal federal or state court systems.<sup>253</sup>

In international arbitration, on the other hand, there is a marked preference for a decision in accordance with the law, and procedures that have proved broadly adequate to attain that objective have been put in place, procedures that incorporate sufficient flexibility to accommodate the diverse legal cultures represented in arbitration. The law and the procedure may not be precisely American law and American procedure. The Court in *Scherk*, however, rejected the view that procedure must be precisely American to justify enforcement of an arbitration agreement, just as a parochial procedural test

---

253. Perhaps judges, consciously or not, still take umbrage at the rejection of litigation in their courts, which the choice of arbitration necessarily implies. Certainly, decisions on issues of provisional remedies or discovery in aid of arbitration sometimes seem to suggest such attitudes. See *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 361 (S.D.N.Y. 1957); *Application of Katz*, 3 A.D.2d 238, 239, 160 N.Y.S.2d 159, 160 (App. Div. 1st Dept. 1957). See also *American Almond Prods. Co. v. Consol. Pecan Sales*, 144 F.2d 448, 451 (2d Cir. 1944).

for the enforcement of a foreign court judgment was rejected nearly a century ago.<sup>254</sup>

The courts of the United States have broadly and repeatedly accepted arbitration as a suitable mechanism for the resolution of complex disputes, even where they concern statutory issues of public importance. They have done so in a series of decisions that directly confronted and rejected contentions that international arbitral procedure cannot be trusted. It would be almost perverse to reintroduce suspicions of the adequacy of international arbitral procedure as a basis for giving an arbitral award a limited reading. If there are, indeed, deficiencies in arbitral procedure to be remedied, desired improvements are more likely to follow from a jurisprudence that gives the same effect to an award that it would to a court judgment than from some standard of lesser recognition that invites the parties to relitigate issues that were or should have been presented to the arbitrators.

---

254. *Hilton v. Guyot*, 159 U.S. 113 (1895). Although ultimately refusing to enforce a French judgment for lack of reciprocity, the Court rejected procedural challenges to the enforcement of the judgment that the parties gave testimony not under oath, that there was no cross-examination, and that evidence had been admitted that would not be admissible in an American court. *Id.* at 202.